In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 591

MALLONEE, BUCKLIN, AND FERGUS, SHAREHOLDERS PROTECTIVE COMMITTEE, AND LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS

v.

FAHEY, AMMANN AS CONSERVATOR, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION [1]

OPINIONS BELOW

a. *Home Loan Bank Board* v. *Mallonee (The*

[1] The parties represented by the Solicitor General pursuant to R. S. 361 (5 U.S.C. 306) are:

1. A. V. Ammann and George K. Bramley, formerly Conservator and Assistant Conservator, respectively, of Long Beach Federal Savings and Loan Association.
2. William K. Divers, J. Alston Adams, and Kenneth G.

Conclusion.

There are conflicts between the opinions of the Court of Appeals and the Supreme Court decision. (*Fahey v. Mallonee, supra.*) This case involves the legal right of 16,000 shareholder depositors, of a Federal Savings and Loan Association, to enforce a final judgment for accounting for their seized savings in excess of $26,000,000.00 from a conservator appointed by the Home Loan Bank Board and removed by the District Court.

Respectfully submitted,

EMMETT E. DOHERTY,

Attorney for John D. Willhoit.

Long Beach Action)[2]—The oral opinion of the United States District Court for the Southern District of California (12511 R. 11146-11165) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (12511 R. 11503-11640) is reported at 196 F. 2d 336.

b. *Fahey* v. *O'Melveny & Myers (The Los Angeles Action)*[3]—The oral opinion of the United States District Court for the Southern District of California (12591 R. 833-847) is not reported. The opinion of the United States Court of Appeals

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Heisler, members of the Home Loan Bank Board, and O. K. LaRoque, former member of the Home Loan Bank Board. The Home Loan Bank Board also has been made a party although it is not a corporate entity authorized by Congress to be sued. Federal Home Loan Bank Act, Sec. 17, as amended by Reorganization Plan No. 3 of 1947, Statutory Appendix, hereafter referred to as Stat. App., pp. 26-28. Cf. *Blackmar* v. *Guerre*, 342 U. S. 512, 515.

3. Federal Savings and Loan Insurance Corporation.

Federal Home Loan Bank of San Francisco, although a federal instrumentality, is represented by private counsel.

John H. Fahey was Home Loan Bank Commissioner and subsequently a member of the Home Loan Bank Board until his resignation on December 20, 1947. Mr. Fahey died on November 19, 1950. His successors in office and the Home Loan Bank Board have been substituted for him under Rule 25(d), Federal Rules of Civil Procedure. On November 20, 1952, Mr. Justice Douglas, in chambers, denied an application by petitioners to vacate the Court of Appeals' stay of the proceedings in the district court, so that petitioners might apply to the district court to substitute the members of the Home Loan Bank Board for Mr. Fahey in his personal capacity. 97 L. Ed. Adv. No. 2, p. 117 . No attempt, however, has been made to substitute his personal representatives. Accordingly, the action has abated as against Mr. Fahey in his personal capacity (Rule 25(a), Federal Rules of Civil Procedure).

[2] The record in this action will be referred to as "12511 R. ."

[3] The record in this action will be referred to as "12591 R. ."

for the Ninth Circuit (12591 R. 878-1032) is reported at 200 F. 2d 420.

c. Earlier stages of this litigation which have been before this Court include *Fahey* v. *Mallonee,* 332 U. S. 245, and *Ex Parte Fahey,* 332 U. S. 258.

JURISDICTION

a. *Home Loan Bank Board* v. *Mallonee*—The judgment of the Court of Appeals was entered on April 2, 1952 (12511 R. 11641-11642). Petitions for rehearing filed on May 1, 1952, were denied on November 13, 1952 (12511 R. 11684). The petition for a writ of certiorari was filed on February 9, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 1254(1).

b. *Fahey* v. *O'Melveny and Myers*—The judgment of the Court of Appeals was entered on November 6, 1952 (12591 R. 1033). Petitions for rehearing filed on December 6, 1952, were denied on December 17, 1952 (12591 R. 1036). The petition for a writ of certiorari was filed on February 9, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 1254(1).

QUESTIONS PRESENTED

1. Whether, where the Home Loan Bank Board located in Washington ordered a Federal Savings and Loan Association located in California to appear at a hearing to be held in Washington, a federal district court in California, lacking personal jurisdiction over the members of the Home Loan Bank Board, could enjoin the holding of the hearing on the grounds that it affected the subject

matter of a case pending before it, and that the court could exercise, if required, the supervisory powers of the Home Loan Bank Board over Federal Savings and Loan Associations.

2. Whether a person claiming to be aggrieved by administrative action may, instead of pursuing his administrative remedy, file an action *in rem* or *quasi-in rem* based on the theory that the governmental action was void *ab initio,* and in that proceeding test the validity of the administrative action.

3. Whether an action for damages lies against officials and government corporations exercising governmental functions, for the alleged improper performance of official acts.

4. Whether a district court may hold null and void the appointment of a conservator for a Federal Savings and Loan Association by the Home Loan Bank Board, where it is admitted (a) that four directors of the Association converted shareholdings in excess of $20,000 into approximately 21,000 separate share accounts of $1 entitled to one vote each, in order to create a voting bloc of about 10 per cent of the outstanding votes, in violation of the charter provision that no member may have more than fifty votes, and (b) that the Association's management created a fund amounting at least to $100,000, in order to fight expected supervisory action against the Association's management.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the separate Statutory Appendix (Stat. App.).

STATEMENT

The two decisions of the Court of Appeals, review of which is sought by petitioners in the instant case, as well as by petitioners in Nos. 592-596 and 658, dispose in effect of a body of litigation, designed to nullify two steps taken in 1946 by the Federal Home Loan Bank Commissioner in connection with his statutory function of supervising the Federal Home Loan Bank system. The first step, discussed mainly in the *Los Angeles* case (No. 592), was the readjustment of the Federal Home Loan Bank districts of Los Angeles and Portland and their merger into a new San Francisco district. The other step, which is the basis of the *Long Beach* case (No. 591), was the appointment of a conservator for the Long Beach Federal Building and Loan Association (hereafter referred to as "Long Beach").

These two administrative actions were essentially independent from one another. Throughout the proceedings, however, petitioners in this case and in Nos. 592-596, 658, have attempted to intertwine these separate basic events through the use of procedural devices such as cross-claims, interpleaders, interventions, third-party actions, and the like. Although the instant petition arises out of an appeal from a temporary injunction prohibiting the holding of an administrative hearing with respect to Long Beach, the opinion of the Court of Appeals,

reversing the order, was based in part on the ground that all the *Long Beach* proceedings should be dismissed (see, *e.g.*, 12511 R. 11582); conversely, some of the ramifications of the *Long Beach* litigation have had their effects upon the *Los Angeles* case. It appears appropriate, therefore, to set forth a fairly detailed account of the facts underlying all seven petitions, as well as of the structure of the Federal Home Loan Bank system.

1. The federal home loan bank system [4]

The Federal Home Loan Bank system, consisting of the Home Loan Bank Board, the Federal Home Loan Banks, the Federal Savings and Loan Associations, and the Federal Savings and Loan Insurance Corporation, was created during the depression years by the Federal Home Loan Bank Act of 1932,[5] the Home Owners Loan Act of 1933,[6] and the National Housing Act of 1934, Title IV.[7]

The *Home Loan Bank Board* [8] heads the system.

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[4] The report of the Comptroller General on the *Audit of the Home Loan Bank Board* for the Year ended June 30, 1952, H. Doc. No. 52, 83d Cong., 1st Sess., pp. 1, 3-4, describes the operation of the Federal Home Loan Bank system. Cf. pp. 10-11 of this report, referring to the instant litigation. See also United States Government Organization Manual 1952-53, pp. 419-421, 621.

[5] 47 Stat. 725. The pertinent sections of this Act are set forth in Stat. App., pp. 7-18.

[6] 48 Stat. 128. The pertinent sections of this Act are set forth in Stat. App., pp. 18-24.

[7] 48 Stat. 1255-1261. The pertinent provisions of this Act are set forth in Stat. App., pp. 24-26.

[8] Federal Home Loan Bank Act, Sec. 17, Stat. App., pp. 16-17. The Federal Home Loan Bank Act originally created the Federal Home Loan Bank Board consisting of five members. By Executive Order No. 9070, 7 F.R. 1529, the functions

The functions of this Board, pertinent to the present inquiry, are the supervision of the Federal Home Loan Banks,[9] of the Federal Savings and Loan Associations[10] and of the Federal Savings and Loan Insurance Corporation.[11]

Federal Home Loan Banks, established pursuant to the Federal Home Loan Act, are intended to serve as a reserve system for home financing institutions.[12] Under Section 3 of the Act,[13] the Home Loan Bank Board is required to divide the United States into not less than eight and not more than twelve districts and to establish as soon as practicable a Federal Home Loan Bank in each district. Under this section, the Board also has the express power to readjust those districts. Savings and home financing institutions are privileged to subscribe to the capital stock of the Federal Home Loan Banks;[14] but if such subscriptions do

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of the Board were transferred to the Federal Home Loan Bank Commissioner, effective February 24, 1942. John H. Fahey served in that capacity in the Spring of 1946. 12511 R. 11611-11614. Reorganization Plan No. 3 of 1947, Stat. App., pp. 26-28, established the present Home Loan Bank Board consisting of three members. See also U. S. Government Organization Manual, 1952-1953, p. 621.

[9] Federal Home Loan Bank Act, Sec. 17, Stat. App., pp. 16-17; cf. *Fahey* v. *Mallonee*, 332 U.S. 245.

[10] National Housing Act, Sec. 402. Stat. App., pp. 24-25. p. 20; *Fahey* v. *Mallonee*, 332 U.S. 245.

[11] National Housing Act, Sec. 402. Stat. App., pp. 24-25.

[12] H. Rep. No. 1418, 72d Cong., 1st Sess., pp. 3, 10. The report points out (p. 6) that the Federal Home Loan Act has been fashioned largely on the European central mortgage banking systems which are subject to vigorous government supervision.

[13] Stat. App., p. 7.

[14] Federal Home Loan Bank Act, Secs. 4(a), 6(c).

not amount to the required minimum capital, as determined by the Board, the United States must subscribe for the difference.[15] Federal Home Loan Banks, and the securities issued by them, enjoy extensive tax exemptions;[16] they also may be designated as depositories of public moneys and as fiscal agents of the United States.[17]

Four of the twelve directors of each of the Federal Home Loan Banks are appointed by the Home Loan Bank Board; the remaining eight are nominated and elected pursuant to rules and regulations prescribed by the Board. The Board also determines which of the directors shall be the Chairman and the Vice Chairman,[18] and has the power to suspend or remove any director, officer, employee, or agent of a Federal Home Loan Bank.[19] The corporate powers of the Federal Home Loan Banks are to be exercised subject to the approval of the Board.[20] They have corporate succession until dissolved by Congress or the Board,[21] which has power to liquidate or reorganize a Federal Home Loan Bank when it finds "that the efficient and economical accomplishment of the purposes of this Act will be aided by such action";[22] and, as has been indicated above, the Board has express power to readjust Federal Home Loan Bank districts.

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[15] Federal Home Loan Bank Act, Sec. 6(a), (f). Stat. App., pp. 8-9.
[16] Federal Home Loan Bank Act, Sec. 13. Stat. App., pp. 14-15.
[17] Federal Home Loan Bank Act, Sec. 14. Stat. App., p. 15.
[18] Federal Home Loan Bank Act, Sec. 7, Stat. App., p. 10.
[19] Federal Home Loan Bank Act, Sec. 17. Stat. App., p. 16.
[20] Federal Home Loan Bank Act, Sec. 12. Stat. App., p. 13.
[21] Federal Home Loan Bank Act, Sec. 25. Stat. App., p. 17.
[22] Federal Home Loan Bank Act, Sec. 26. Stat. App., p. 17.

Federal Savings and Loan Associations were established by the Home Owners' Loan Act of 1933 "in order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes." [23] The Home Loan Bank Board is authorized to provide for the organization, incorporation, examination, and regulation of associations to be known as "'Federal Savings and Loan Associations' * * * giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." [24] Federal Savings and Loan Associations automatically become members of the Federal Home Loan Bank in the district of which they are located, or, in some circumstances, of an adjoining one.[25] The Act provides for public financial support of Federal Savings and Loan Associations by way of stock subscriptions on the part of the Secretary of the Treasury and the Home Owners' Loan Corporation,[26] and for extensive tax exemptions.[27] Section 5(d) (Stat. App., p. 20) grants the Board full power to provide rules and regulations governing the reorganization, consolidation, merger, or liquidation of Federal Savings and Loan Associations, including the power to appoint a conservator.[28]

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[23] Home Owners' Loan Act of 1933, Sec. 5(a). Stat. App. pp. 18-24.

[24] *Ibid.*

[25] Home Owners' Loan Act of 1933, Section 5(f). Stat. App. p. 21.

[26] Section 5(g). Stat. App., p. 21.

[27] Section 5(h). Stat. App., p. 22.

[28] Cf. *Fahey* v. *Mallonee*, 332 U.S. 245.

The *Federal Savings and Loan Insurance Corporation,* created pursuant to Title IV of the National Housing Act of 1934, is under the direction of a board of trustees composed of the members of the Home Loan Bank Board.[29] The Corporation insures the accounts of all Federal Savings and Loan Associations and may insure the accounts of other similar institutions.[30] The insurance becomes payable upon default of the insured institution and is payable either in cash or by the opening of a new insured account with another insured institution.[31]

2. THE ADMINISTRATIVE ACTIONS UNDERLYING THE LITIGATION

a. *The readjustment of the Federal Home Loan Bank districts on the Pacific coast.* On March 29, 1946, the Federal Home Loan Bank Commissioner,[32] acting pursuant to Secs. 3, 25, and 26 of the Home Loan Bank Act,[33] and finding that the proposed action would "aid the efficient and economic accomplishment of the * * * Act," issued three orders (Nos. 5082, 5083, and 5084, 12511 R.

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[29] National Housing Act of 1934, Sec. 402(a), Stat. App., p. 24 and Reorganization Plan No. 3 of 1947, Sec. 2(c), Stat. App., pp. 27-28.

[30] National Housing Act of 1934, Sec. 403(a).

[31] National Housing Act of 1934, Sec. 405(b) as amended, Stat. App., pp. 25-26. Prior to 1950, immediate cash payment was limited to 10%. Payment of the balance was spread out over a three-year period.

[32] The Commissioner was the predecessor in office of the present Home Loan Bank Board (12511 R. 11611-11612). See fn. 8, *supra*, pp. 6-7.

[33] Stat. App., pp. 7, 7-18.

11614-11617) which readjusted the territory of the Eleventh Federal Home Loan Bank District (Portland) [34] so as to include the Twelfth District (Los Angeles),[35] moved the Federal Home Loan Bank of Portland to San Francisco and renamed it the Federal Home Loan Bank of San Francisco. The orders also provided for the transfer of the assets, liabilities and members of Los Angeles to San Francisco and for the dissolution of Los Angeles.

b. *The appointment of a conservator for Long Beach Federal Building and Loan Association.* An examination of the Long Beach Federal Building and Loan Association (a member of the then Los Angeles Federal Home Loan Bank), conducted in July 1945, disclosed a suspicious transaction between Long Beach's president and one of its customers (12591 R. 113-114). Supplementary examinations of Long Beach conducted in April and May 1946, disclosed additional circumstances indicating that some members of the management of Long Beach were making secret profits in their dealings with certain customers of Long Beach (12591 R. 66-112, 122-128) and other even more alarming facts.[36] As a result, Federal Home Loan

[34] The Eleventh District covered the northern part of the Pacific and mountain states.

[35] The Twelfth District covered the southern part of the Pacific and mountain states and the Territory of Hawaii.

[36] These facts included among others the conversion by four of the directors of their shareholdings, totalling $21,000, into 21,000 separate share accounts for the purpose of obtaining greater voting power, in spite of the charter provisions that no member may hold more than fifty votes (cf. Sec. 4 of the Charter of Federal Savings & Loan Associations, 24 C.F.R. (1952 Pocket Supp.) § 144.1(4)); the appropriation of $100,-

Bank Commissioner Fahey issued Order No. 5254, in which he appointed A. V. Ammann as conservator for Long Beach (12511 R. 11610).[37] The order contained a number of findings, including determinations to the effect that Long Beach conducted its business in an unlawful and unauthorized manner and that it had a management which was unsafe and unfit to manage a Federal Savings and Loan Association (12511 R. 11610-11611).

Pursuant to a demand made on May 24, 1946 (12511 R. 11622-11624), the management of Long Beach was furnished on May 29, 1946, with a "More Definite Statement" of the reasons which led to the appointment of the conservator (12511 R. 11624-11629).[38] The following day, the Long Beach management requested an administrative hearing on the appointment of the conservator (12511 R. 11618-11620). The Federal Home Loan Bank Ad-

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000 for the purpose of conducting expected litigation against the Federal Home Loan Bank Administration, removal of a cashier's check for $50,000 from the Association without making a record thereof, unauthorized payments to the president of the Association, an attempt to cover up for them by retroactively increasing his salary, and either the predating of this transaction in the books of the Association, or the failure to include it for several months in the reports to Federal Home Loan Bank Administration. Cf. *Fahey* v. *Mallonee*, 332 U.S. 245, 254.

[37] The appointment of a conservator terminates the power of the management to represent the Association and transfers this authority to the conservator. In contrast to the appointment of a receiver, it does not affect the title of the Association to its assets. See 24 C.F.R. (Pocket Supp. 1952) 148.4, 149.3, 150.3. The corresponding Rules in effect in the Spring of 1946 were 24 C.F.R. (Cum. Supp. 1944) 206.4, 207.3, 208.3

[38] This statement embodied in effect the findings made in the audit which had led to the appointment of the conservator. See *supra*, fn. 36, pp. 11-12; cf. *Fahey* v. *Mallonee*, 332 U.S. 245, 254.

ministration granted this request on June 5, 1946, and directed that a hearing be held on July 3, 1946, in Los Angeles (12511 R. 11629-11631).

The appointment of the conservator was followed by a serious run on Long Beach. The conservator was required to borrow some $7,300,000—subsequently reduced to $6,300,000—from the Federal Home Loan Bank of San Francisco and to pledge as security for this loan $5,300,000 face value of government bonds and some 8,000 notes and trust deeds held by Long Beach, with a face value of some $12,000,000 (12591 R. 889).[38a]

3. THE PROCEEDINGS IN THE LONG BEACH LITIGATION

a. *The original complaints.* On May 27, 1946, petitioners Mallonee, Newhouse, and Bucklin, shareholders of Long Beach, filed an action in the United States District Court for the Southern District of California, on behalf of all the shareholders of Long Beach, against Commissioner Fahey, Conservator Ammann, Long Beach, and a large number of fictitious defendants, in which they challenged the validity of the appointment of the conservator, and asked for an order removing him, restoring Long Beach to its former management, requiring

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[38a] Petitioners have tried to use this loan as a legal link between the *Long Beach* and *Los Angeles* actions. See *infra*, pp. 14, 23-25. The claims are, on the one hand, that the conservator lacked the authority to create this indebtedness of Long Beach, in spite of the fact that Long Beach obtained the benefit of the loan. On the other hand, it is alleged that the money advanced by the Bank was actually the money of Los Angeles, and that Long Beach does not know whether it owes the debt to San Francisco or Los Angeles.

Fahey and the conservator to account, and adjudicating the rights of the parties (12511 R. 1-25).[39] On July 1, 1946, Long Beach, the nominal defendant, filed a pleading containing a cross-claim against Fahey and Ammann substantially identical to the original complaint filed by Mallonee, Newhouse and Bucklin (12511 R. 302, 323-358), and a third-party complaint against the Federal Home Loan Banks of San Francisco, Los Angeles, and Portland, on the grounds that the appointment of Ammann being illegal and void, the pledge of Long Beach's assets to San Francisco was void, and that, in addition, the dissolution of Los Angeles was void and accordingly Long Beach did not know which of the three Federal Home Loan Banks was the proper defendant (12511 R. 286-301). On August 22, 1946, Los Angeles, as third-party defendant, filed a similar cross-complaint, challenging the validity of its own dissolution (12511 R. 564-586).[39a]

b. *Various interpleaders.*

(i) Title Service Company. An answer and cross-complaint in interpleader was filed on June 4, 1946, by Title Service Company, a corporation without issued capital stock, the management of which was virtually identical to that of Long Beach

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[39] This was the beginning of the so-called *Long Beach* litigation.

[39a] On the same day, Los Angeles and six of its former member associations filed an independent, but virtually identical, complaint, challenging the dissolution of Los Angeles (12511 R. 9465-9497). This was the so-called *Los Angeles* action.

(12511 R. 11081, 11087, 11517, 11519). Title Service deposited 174 trust deeds in court, alleging that it was named trustee in trust deeds securing loans granted by Long Beach and that it was faced with conflicting directions from the conservator, who requested reconveyance of the deeds to the borrowers who had made their final payments to him, and from the officers of Long Beach (*i.e.*, the interpleading parties themselves) who contested the conservator's authority. The interpleader asked that the court adjudicate the right of the conflicting claimants (12511 R. 45-55). These pleadings did not dispute the fact that the deeds should be reconveyed to borrowers who had made their final payments. As additional requests for reconveyances were made, Title Service filed four supplemental interpleaders (12511 R. 766, 995, 2305, 2581). Borrowers desiring to obtain discharge of their mortgages were required to intervene in the *Mallonee* action (*i.e.*, the *Long Beach* suit) and to deposit their final payment in court.[40] This procedure added at least fifty interventions to the *Mallonee* action.[41]

(ii) Wallis interpleader. On June 12, 1946 (12511 R. 86-100), an interpleader was filed by Robert H. Wallis, the payee of the $50,000 check referred to *supra,* fn. 36, pp. 11-12. Wallis alleged that he acted as an attorney for Long Beach, that

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[40] As the result of the order requiring the payment of these moneys into court, more than $1,500,000 of the Long Beach's funds were tied up, over the protest of the conservator (12511 R. 10204).

[41] 12511 R. 11560, 8287, 8291-8293.

he was given the check for the purpose of defending Long Beach against the expected attacks made upon it by Fahey and that the Long Beach management still insisted that the money be used for such purpose, while the conservator claimed that the fund could not be so used. He therefore asked the court to instruct him as to his duties in respect to this $50,000 check.

(iii) Turner interpleader. Turner is the lessee of a building which he rented from Long Beach. The claim that the rent charged to Turner was inadequate was one of the charges which led to the appointment of the conservator (12511 R. 11627). On January 29, 1948 (12511 R. 3461-3487), over a year and one-half after the filing of the original complaints, and five days after the termination of the conservatorship of Long Beach (see *infra,* p. 21), Turner filed his interpleader, paying into court the rent which had accrued during the conservatorship ($11,515.87). He alleged that he had withheld the rent while there were conflicting claims between the conservator and the management of Long Beach and that the termination of the conservatorship did not put an end to the conflicting claims since two shareholders of Long Beach had filed derivative stockholder actions, in a state court, charging that the lease was collusive. The nexus between that stockholder action and the instant litigation was attempted to be supplied by an allegation to the effect that the stockholders' action had been filed in collusion with Ammann (12511 R. 3477).

(iv) The interpleading of the Federal Savings and Loan Insurance Corporation. The Second Supplemental Cross-Claim filed by Long Beach on May 11, 1949 (12511 R. 6736-6790) contains an interpleader of the Federal Savings and Loan Insurance Corporation. In accord with this pleading, Long Beach paid into the district court premiums owed to the Corporation on the grounds that its stockholders challenged the amount of the premiums due and that by paying the full amount the management might render itself liable to the stockholders or estop itself from challenging some of the conservator's actions, while nonpayment of such premiums might result in penalties and forfeitures (see also 12511 R. 6920-6933).

e. *Service on non-resident defendants.* A number of the defendants—in particular, Fahey, the members of the Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation —were not residents of California. Service was made upon them pursuant to 28 U.S.C. 1655 and 2361 (Stat. App., pp. 3 and 5) on the theory that the actions were *in rem* and that the interpleaders came within the terms of the Federal Interpleader Statute (28 U.S.C. 1335), Stat. App., p. 1. Cf. 12511 R. 65-68, 9502-9510; 78-82.

d. *The first injunction proceedings.*[42] As has been pointed out (*supra,* pp. 12-13), the Federal Home Loan Bank Administration, in compliance with a request made by the management of Long

[42] These proceedings were before this Court in *Fahey* v. *Mallonee,* 332 U.S. 245.

Beach, had set a hearing on the appointment of the Long Beach conservator for July 3, 1946. The holding of this hearing was enjoined on July 1, 1946, by a temporary restraining order obtained by the plaintiff shareholders in the *Mallonee* action [43] on the ground that Section 5(d) of the Home Owners' Loan Act,[44] providing for the appointment of a conservator, and the regulations issued thereunder, were unconstitutional (12511 R. 362-367, 372-374).[45] This injunction was made permanent by a three-judge district court which, prior to the filing of an answer, held Section 5(d) unconstitutional, removed the conservator, and enjoined the holding of the administrative hearing (12511 F. 743-757).[46]

This Court reversed the decision of the district court. It held that the court had erred in finding Section 5(d) unconstitutional, in ousting the conservator, and in enjoining any of his proceedings or the administrative hearing, "and this without prejudice to any other administrative or judicial proceedings which may be warranted by law." *Fahey* v. *Mallonee,* 332 U.S. 245, 257-258.

e. *Proceedings immediately subsequent to the decision in Fahey* v. *Mallonee, 332 U.S. 245.* As the result of the decision of this Court, the district court, on November 10, 1947, vacated the order en-

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[43] 12511 R. 11543.

[44] Stat. App., p. 20.

[45] Subsequently, the management of Long Beach joined the proceedings to enjoin the holding of the hearings they themselves had requested. Cf. Brief filed by Long Beach in No. 687, O.T. 1946.

[46] The execution of this order was stayed by Mr. Justice Rutledge (12511 R. 762-763).

joining the holding of the administrative hearing (12511 R. 10302). It refused, however, to dismiss the interpleaders or to release the funds paid into court under them (12511 R. 10302), although, as counsel for the conservator pointed out, this, in effect, continued the original injunction reversed by this Court (12511 R. 10203, 10218).

With respect to the original complaints, the District Judge (who had been a member of the original three judge court) advised Mallonee and Long Beach that under this Court's decision their complaints would have to be dismissed for failure to exhaust their administrative remedy, *viz.*, the hearing before the Federal Home Loan Bank Administration on the appointment of the conservator. The District Judge volunteered, however, that he would maintain the complaints if they were then amended to contain the further charge that the administrative officials had acted fraudulently, and he gave plaintiffs leave to amend accordingly.[47]

Amended pleadings filed by Mallonee *et al.* on December 9, 1947 (12511 R. 2960-3098) and by Long Beach on January 13, 1948 (12511 R. 3184-3366), contained the allegations, suggested by the District Judge, that the actions of the defendant officials were fraudulent. The specifications of fraud were that the findings supporting the order appointing the conservator and the "More Definite Statement" of the reasons leading to the appointment were false and known to be false to the

[47] See the opinion of the court below, 196 F. 2d 336, 370-373; 12511 R. 11562-11568, 11631-11633, 10298-10302.

defendant officials (12511 R. 2977, 2983, 3216). Long Beach's pleading, however, admitted the charges that Long Beach had appropriated $100,000, had paid out a cashier's check amounting to $50,000, and that four directors had converted their holdings into approximately 21,000 $1.00 share accounts with one vote each as described at fn. 36, pp. 11-12. It was pleaded in confession and avoidance that these steps were necessary to counteract the "malicious" measures the supervising authorities were expected to take and that these 21,000 votes represented merely ten per cent of the total votes available (12511 R. 3237, 3239-3240, 3241-3242).

After this Court's reversal of the injunction prohibiting the holding of the administrative hearing on the appointment of the conservator, the Home Loan Bank Board rescheduled it for December 15, 1947. As the Court of Appeals found, this hearing was indefinitely postponed at the request of both Long Beach and Mallonee *et al.* (12511 R. 11637).[48]

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[48] The petitions (cf. No. 591, p. 21) assert repeatedly that administrative hearings were denied by the Home Loan Bank Board and they refer to extracts from an exchange of correspondence between the Board and attorneys for minority stockholders. Petitioners' Combined Appendix, 19-21. Full reproduction of the documents would have disclosed that the demand for the hearing came from a group of shareholders, seeking *reinstatement* of the conservatorship, who had filed a stockholders action against the management of Long Beach (*supra*, p. 16). The hearing was denied on the ground that such demand must be initiated by the Board of Directors (24 C.F.R. (Pocket Supp. 1952) 148.2). Petitioners can derive no support from the denial of a hearing to a group hostile to them, especially when the hearings had been adjourned at their own request. Indeed, the grant of this hearing to the minority stockholders might well have been a breach of faith with petitioners themselves.

f. *Termination of the conservatorship.* The above-described proceedings—interpleaders, interventions, payments into court—virtually strangled the conservatorship. As pointed out by the court below, Long Beach was in effect run not by the conservator but by the district court (12511 R. 11561). The continuation of the Title Service interpleader, which required payment into court of the final payments made by mortgagors, depleted the working capital of Long Beach (cf. 12511 R. 10203-10204); so did the district court's refusal to release the impounded funds to the conservator (12511 R. 10302).

At this juncture, the Board decided to terminate the conservatorship (12511 R. 11637-38). Its Order No. 388, dated January 17, 1948, provided for the termination of the conservatorship upon request of the authorized representative of Long Beach and that the assets of Long Beach be turned over to such authorized representative. A subsequent telegram of the Board interpreted this formula to mean that the assets were to be turned over, not to the old management, but to a representative to be selected by the shareholders after a new vote (12511 R. 10312). The district court, however, disregarded this interpretation and by an order dated January 23, 1948, ordered the conservator to return Long Beach to its old management and to account to the court (12511 R. 8310-8327). Although jurisdiction of the district court was still contested, the conservator filed his account

on September 27, 1948 (12511 R. 8235-8239).[49] Since the termination of the conservatorship mooted a number of appeals previously taken by the conservator from certain orders made in borrower-intervention proceedings and from an order allowing an attorneys fee, the appeals were voluntarily dismissed. Cf. 12511 R. 3549-3552.

On May 28, 1948, after the termination of the conservatorship, Long Beach filed a supplemental cross-claim to its amended cross-claim (12511 R. 4161-4332). This pleading proceeded on the theory that since the appointment of the conservator was null and void his dealings with Long Beach's property constituted a conversion for which the defendants were liable in damages.

g. *The San Francisco impound.* By order dated March 13, 1948, the district court directed the San Francisco Home Loan Bank (see *supra*, pp. 10-11, 13) to deposit in court the notes of Long Beach, executed by the conservator, evidencing the Long Beach indebtedness of $6,300,000 to the San Francisco Bank, and all the collateral pledged to secure this debt, i.e., $5,300,000, in government securities and the notes and trust deeds (12511 R. 8399-8524; 12591 R. 889). On March 26, 1948, the district court released the notes and trust deeds to Long Beach free and clear of San Francisco's lien and

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[49] The account and inventory consist of some 800 pages comprising some 150,000 separate items, and have been attacked by petitioners, basically on the ground that since under their theory the conservator's appointment was void, he could not legally dispose of Long Beach's property or enter into any valid contract on its behalf.

transferred this lien to some of the cash deposited in court (12511 R. 8526-8536; 12591 R. 889).[50]

h. *Summary of the complaints as they now stand.* Both the shareholders' complaint in the *Mallonee* action and cross-claim of the Long Beach Association proceeded on the avowed theory that, as the conservator's appointment was illegal, each and every transaction of Long Beach during the conservatorship was "void, ab initio," and subject to challenge, pending the outcome of the litigation testing the validity of the appointment (12511 R. 3079, 3321).[51] It was alleged that, on the appointment of the conservator, withdrawals in excess of $6,000,000 of savings (share accounts) occurred (12511 R. 311, 3220, 3246), and that Long Beach, during the conservatorship, borrowed a like amount from San Francisco, pledging as security therefor

[50] In March, 1952, by special leave of the Court of Appeals, San Francisco filed an action against Long Beach in which it sought payment of the notes and enforcement of the liens. The filing of this complaint gave rise to a new avalanche of counterclaims, third-party complaints, cross-claims, interpleaders, and interventions, weighing nearly 12 pounds. The district court is actively entertaining those pleadings, which are substantially identical to those of the present litigation, in spite of the fact that the Court of Appeals has indicated that the instant complaints should have been dismissed and has stayed all further proceedings in the district court (12511 R. 11685).

We have been authorized by the Federal Home Loan Bank of San Francisco to repeat its statement before the Court of Appeals that it does not seek the return of the notes and trust deeds returned to Long Beach pursuant to the order of March 26, 1948, nor to exercise its lien on those notes and trust deeds. See also par. 7 of the mandate proposed to the court below (12511 R. 11642, 11644).

[51] As noted above (*supra*, pp. 19-20), the complaints were amended, after this Court's decision in *Fahey* v. *Mallonee*, 332 U.S. 245, to allege fraud and bad faith in the appointment of the conservator.

approximately $12,000,000 of Long Beach's notes and trust deeds on homes of 8,000 borrowers (12511 R. 3224, 667-668, 3584-3586), thereby clouding the titles thereto; used Long Beach's funds to pay principal and interest to the Bank and to purchase shares therein (12511 R. 4219, 4222, 4227, 4229); sold millions of dollars of Long Beach's United States Government bonds (12511 R. 4197, 4199, 4201, 4204); and made $4,000,000 of "improvident" loans (12511 R. 4174). Each of these transactions allegedly gave rise to "controversies" which were "increasing multifold, both in numbers of parties, in the millions of dollars of assets involved, and are snowballing in magnitude, to the point of making extremely difficult, a final settlement * * *" (12511 R. 3310-3311).

The relief originally prayed for included the removal of the conservator; the return of Long Beach's assets to its former management; the filing of a "detailed" statement or "accounting" describing the assets turned over to the conservator on the date of his appointment and each of the conservator's subsequent dealings therein (12511 R. 22-23, 350-351); and a determination whether Los Angeles was lawfully dissolved (12511 R. 300-301). As later amended, the complaint and cross-claims further prayed for a judgment decreeing that all obligations incurred by Long Beach during the conservatorship, particularly the loan from San Francisco, and all transfers of Long Beach's property in pledge or otherwise during the same period, were null and void, and directing that all such property

in the possession or control of the defendants be returned to Long Beach, or that, if any such property could not be so returned, Long Beach be awarded money damages against the defendants personally served within the local district, in the amount of the highest value from the time the property was allegedly converted to the date of the trial (12511 R. 3317). Long Beach's supplemental cross-claim, filed May 27, 1948, prayed for such damages without limitation to the property which could not be so returned or to the defendants thus served (12511 R. 4161, 4167, *et seq.*).

No trial on the merits of these various allegations has yet been had.

i. *The injunction under review in the Court of Appeals.* As pointed out (*supra,* pp. 21-22), Long Beach was returned to its management in January, 1948. The latter, however, omitted to submit to the Home Loan Bank Board the annual and monthly reports prescribed by the regulations 24 C. F. R. (Pocket Supp. 1952) 145.21, 145.22, 145.23) and did not pay the semi-annual premiums to Federal Savings and Loan Insurance Corporation.[52] The Board, therefore, issued its Order No. 2015 (12511 R. 11595-11596), on September 9, 1949, calling for Long Beach to appear in Washington to show cause why the Board should not take such action as might appear appropriate, including the appointment of the Federal Savings and Loan Insurance Corporation as receiver.

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[52] On the Federal Savings and Loan Insurance Corporation interpleader see *supra,* p. 17.

On October 18, 1949, Mallonee *et al.*, Long Beach, Title Service, Wallis, and Turner obtained a temporary restraining order enjoining the holding of the Board hearing (12511 R. 8328-8356). Hearings on an application for preliminary injunction were held on November 8 and 9, 1949 (12511 R. 11162). Detailed findings of fact were then formulated at a hearing from which government counsel were expressly excluded (12511 R. 11174-11176).[53] The formal order dated December 1, 1949, which with its exhibits covers the entire Vol. XVIII of the printed record, enjoined the respondents from holding the administrative hearing and from interfering in any way with the subject matter of the litigation. In issuing the injunction, the district court held that it had jurisdiction over all persons and parties to the consolidated actions and of the subject matter thereof (12511 R. 11146-11153); that the proposed administrative hearing, insofar as it related to the charges made in the "More Definite Statement" of May 29, 1946 (*supra*, p. 12), involved the same matters as those at issue in the pending *Mallonee* action (12511 R. 11157), and insofar as it related to the failure of Long Beach to file monthly and annual reports, was unwarranted because the filing of such reports would require Long Beach to waive its claims for damages and other relief in the pending *Mallonee* action

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[53] The district judge stated (at 12511 R. 11177), "I have invited you gentlemen because I feel that this is to be the Court's order and that I have the right to invite any counsel in the case to assist me and to exclude any other counsel in the preparation of this order * * *."

(12511 R. 11153-11154, 11157-11158); that the holding of the administrative hearing would thus interfere with the court's jurisdiction, as well as with the enforcement of orders theretofore entered by the court in ancillary proceedings (12511 R. 8263, 8271); and that if there were any legitimate grounds for complaint against Long Beach's management, the Board could file its complaint with the court and obtain from it any appropriate relief. (12511 R. 8256, 11162). As the result of this injunction and Long Beach's refusal to submit reports, there has been no administrative supervision of Long Beach for the last five years,[54] since the withdrawal of the conservator in January 1948.

j. *The Court of Appeals' decision.* The Court of Appeals reversed the district court's order of injunction (12511 R. 11503-11640). It based its decision largely on petitioners' failure to exhaust their administrative remedies—the hearing before the Home Loan Bank Board on the appointment of the conservator (*supra*, pp. 12-13)—and pointed out that this administrative remedy, far from being a trivial technicality, would have provided a simple record from which such judicial review as might be warranted could have been had (12611 R. 11557). It also pointed out that the by-passing of the administrative remedy, on the theory that the administrative action was null and void and could be

[54] Report on Audit of the Financial Statement and Accounts of the Home Loan Bank Board and the Organizations under its Supervision for the Term Ended June 30, 1952. H. Doc. No. 52, 83rd Cong., 1st Sess., p. 11.

disregarded in a judicial proceeding, resulted in a record on appeal—without ever reaching the merits of the allegations—of approximately 11,500 pages, necessitating an index of 129 pages, more than fifty interpleaders, and more than 100 hearings, asserted to have led to ten final judgments. Before the court were brought thousands of fictitious defendants and about 100 specific defendants. A notice of *lis pendens* covering several thousand parcels of real estate had been filed. Finally, the district court felt itself forced to run the affairs of Long Beach (12511 R. 11559-11561). The Court of Appeals epitomized its conclusions as follows (12511 R. 11606-11607):

> The presently involved state of the record which resulted from the failure to exhaust the administrative remedy in the initiatory stage of this litigation thereby causing this litigation to fan out and proliferate into its present complications provides no sound reason in law for another judicial repudiation of a procedure clearly authorized under law and the rules and regulations of the Board. The answer to the unhappy and regrettable involvements of this long drawn-out and costly litigation is not to be found in a further resort to a court injunction to completely thwart an administrative process which Congress has seen fit to approve.

ARGUMENT

This case arises out of attempts by the petitioners to nullify the effective supervision of one Federal

Savings and Loan Association by the administrative agency created by Congress for the very purpose of regulating and supervising Federal Savings and Loan Associations. There are no fundamental constitutional problems concerning property rights, seizure, or confiscation involved here. The petitioners[55] are engaged in the operation of a savings institution, which has traditionally been subject to the most stringent regulation and supervision.[56] Moreover, Federal Savings and Loan Associations—above and beyond normal banking institutions—have unquestionably a public character,[57] and their establishment has been made possible only by public subsidies.[58] The supervision of such associations has been entrusted by Congress to an expert administrative body, the present Home Loan Bank Board. By dint of their pleadings and subsidiary proceedings in their main suit, petitioners have succeeded in nullifying the express statutory powers of the Board for seven years. When this Court in effect found their original pleadings insufficient, the expedient of amending those pleadings to include allegations of fraud continued to prevent administrative action which was

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[55] The petitioners in No. 591 are Long Beach Federal Savings and Loan Association and Mallonee, Bucklin, and Fergus, suing on behalf of the association. Their rights, of course, are not any more extensive than those of the association. *Fahey* v. *Mallonee*, 332 U.S. 245, 255.

[56] *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254. Petitioners appear to be the first persons, since the passage of the Home Owners' Loan Act of 1933, to challenge the supervisory powers of the Home Loan Bank Board and its predecessors.

[57] *Fahey* v. *Mallonee*, 332 U.S. 245, 256.

[58] *Supra*, p. 9.

long overdue. Yet the supposed fraud consisted, not in personal corruption or a breach of trust for personal gain, but in the making of the administrative findings in the knowledge that they were false, a contention clearly insufficient to warrant any kind of collateral attack when a proceeding for administrative review of the findings was readily available. The nature of these allegations of "fraud" is indicated by the fact that petitioners admitted the truth of serious charges of breach of trust imposed upon them as officers of banking institutions in their own pleadings (see *supra*, p. 20).[59]

Moreover, although petitioners primarily sought to set aside administrative action which originated in Washington, they have sought to evade the proper venue by drawing up the complaint as an *in rem* action relating to the property of Long Beach. This, in turn, compelled them to adopt the theory that the administrative action sought to be overturned was absolutely void and that the business transactions performed by the conservator during the 20 months of his tenure were equally void. The attempt to try an action seeking judicial review of administrative action as if it were "a conventional cause of action in equity by an owner out of possession, to quiet title, to remove a cloud on title, and to regain possession" [60] resulted, of neces-

[59] Petitioners could not deny the truth of several of the charges (acquisition by the four directors of 21,000 shares, in violation of the charter provisions limiting shareholderships to 50 shares per holder; and placing at the disposal of the directors and their attorney a fund of at least $100,000, *supra*, fn. 36, pp. 11-12; 20), but considered them answered by the mere assertion that they were necessary to forestall adverse action expected to be taken by the supervisory authorities.

[60] Wilmington Petition (No. 592) p. 43.

sity, in unmanageable proceedings. As pleadings and orders grew in length and size, and the number of parties acquired inflationary proportions,[61] the day on which the merits could be tried became more and more remote.[62] The mere mechanical failure of these proceedings discloses the wisdom of the rules which require the exhaustion of administrative remedies, give validity to the acts of a *de facto* officer, and prohibit such collateral attacks on the validity of administrative action as have been attempted here.

While the direct subject matter of this petition is the reversal by the court below of an interlocutory injunction, the scope of review in the Court of Appeals was not limited to the propriety *vel non* of the issuance of the interlocutory injunction. Quite properly, that court not only reversed the injunction but indicated that the complaints and proceedings should be dismissed. Further prosecution of the suit will entail needless expense because of several insuperable objections to the maintenance of the proceedings, and for that reason the court below could order the entire suit dismissed. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52-53; *North Carolina Railroad* v. *Story*, 268 U.S. 288,

[61] The nearly 200-page long pleading filed by Long Beach on January 13, 1948 (12511 R. 3184-3366) contains the significant admission: "That said controversies have been multiplying and increasing multifold, both in numbers of parties, in the millions of dollars of assets involved, and are snowballing in magnitude, to the point of making extremely difficult, a final settlement and determination, even by this Honorable United States District Court, with its broad equity powers." 12511 R. 3310-3311. In other words, the premature interposition of equity has engendered rather than avoided multiplicity of action. Cf. 12511 R. 11557.

[62] 12511 R. 8257.

292; *Deckert* v. *Independence Corp.*, 311 U.S. 282, 287; *Orth* v. *Transit Inv. Corporation*, 132 F. 2d 938, 944 (C.A. 3).

1. Without regard to any questions of exhaustion of administrative remedies or of procedure, the pleadings must fail on the admitted facts. For the validity of Ammann's appointment as conservator is the focal point of this action,[63] and it appears from the pleadings that this administrative step was completely justified.[64]

The cross-claim of Long Beach admits (12511 R. 3241-3243) the creation of 21,000 one-dollar, one-vote share accounts to be voted by four of the directors, and that these 21,000 shares were created in order to constitute a block of 10 per cent of the votes of Long Beach, to be used in a proxy fight.[65]

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[63] The instant petition, it is true, also raises the issue of the consolidation of the Federal Home Loan Banks of Los Angeles and Portland into the San Francisco Bank. In so far as this case is concerned, that issue has only ancillary impact and we shall discuss it in our brief in opposition in No. 592.

[64] In *Fahey* v. *Mallonee*, 332 U.S. 245, decided on the basis of the original pleadings before an answer was filed (332 U.S. at 248), this Court held that the state of the pleadings did not disclose sufficiently the scope of the controversy and reversed the injunction without prejudice to any other administrative or judicial proceedings which may be warranted by law (332 U.S. at 257-258). This mandate, of course, did not guarantee petitioners a right to a trial on the merits if it appeared that judicial proceedings were not warranted by law.

[65] Congress has recognized that in modern corporate practice, with widely held securities and the failure of many stockholders to vote, a block of 10% or even 5% of the vote may exercise control over a corporation. See, *e.g.*, Public Utility Act of 1935, Sec. 2(a)(7), (8), (11); 49 Stat. 803, 806-807, 808; 15 U.S.C. 79b(a) (7), (8), (11). The Home Loan Bank Administration could easily have reached the same conclusion with respect to Federal Savings and Loan Associations, especially since many shareholders consider themselves depositors rather than voting members.

It is settled doctrine that officers and directors, even of an ordinary private corporation, may not use their positions tc transfer voting control to themselves or to assist other persons to acquire such control.[66] And the offense of the Long Beach management is aggravated by the additional circumstance that the Long Beach charter provides expressly that no member shall have more than fifty votes (see *supra,* fn. 36, p. 11). Moreover, in view of the quasi-public character of mutual savings and saving and loan associations, their officers and directors are subject to standards considerably higher than those of ordinary commercial corporations; their duties have been held identical with those of the trustees of a direct trust. *Greenfield Savings Bank* v. *Abercrombie,* 211 Mass. 252; see also *French* v. *Armstrong,* 79 N.J. Eq. 289; *Huntington* v. *National Savings Bank,* 96 U.S. 388.

Similar considerations apply to the admitted appropriation of $100,000 to subsidize the anticipated fight of the Long Beach management against the supervisory authorities (12511 R. 3237-3239; *supra,* fn. 36, pp. 11-12; 20). Corporate directors or officers may not use corporate funds to defend themselves against charges of misconduct and mismanagement. At best, they are entitled to reimbursement of their expenses if they defend the ac-

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[66] *Andersen* v. *Albert & J. M. Anderson Mfg. Co.,* 325 Mass. 343; *Carlisle* v. *Smith,* 234 Fed. 759 (N.D. Ga.); 3 Fletcher, *Cyclopedia of the Law of Private Corporations* (Perm. Ed.) Sec. 1000.

tion successfully;[67] no recovery is authorized if they are unsuccessful. *Bailey* v. *McLellan,* 159 F. 2d 1014, 1016-1017 (C.A. 1); *Rogers* v. *Hill,* 34 F. Supp. 358, 370 (S.D. N.Y.); cf. Note 152 A.L.R. 924-926. The appropriation of $100,000 to finance the vindication of the management's position was therefore a plain breach of trust, and the same considerations apply to the payment of $50,000 to Wallis, *supra,* pp. 15-16. Certainly, the mere fact that Long Beach's management believed in the correctness of their position and felt themselves persecuted by the Federal Home Loan Administration could not exempt them from their fiduciary duties.

The admitted facts thus presented at least two serious violations of their fiduciary duties by the Long Beach management. The appointment of a conservator pending further investigation of these charges[68] was obviously more than justified in the circumstances—especially considering the delicate nature of the banking business (*Fahey* v. *Mallonee,* 332 U.S. 245, 253). And once it appears that the appointment of the conservator was justified by a lawful purpose, any alleged ulterior motives in the mind of the Administrator are irrelevant. *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 145; *United States* v. *Rock Royal Co-Op.,* 307

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[67] Even this reimbursement may require express statutory sanction. Cf. Hornstein, *The Counsel Fee in Stockholder's Derivative Suits,* (1939) 39 Col. L. Rev. 784, 816, with Hornstein, *Directors' Expenses in Stockholder's Suits,* (1943) 43 Col. L. Rev. 301, and N. Y. General Corporation Law, Secs. 63, 67.

[68] And see the bank examiner's reports (12591 R. 66-129).

U.S. 533, 559-560; *United States* v. *Morgan*, 313 U.S. 409, 422. Because the appointment of the conservator was warranted by these admitted facts, the Court of Appeals was clearly correct in directing the dismissal of the entire proceedings, which are predicated wholly on the theory that Ammann's appointment was unwarranted, illegal, and void, and that every act performed by him was void *ab initio*.

2. After the termination of the conservatorship in January 1948, the relief sought by petitioners was restricted to demands for damages and for a judgment decreeing that all obligations incurred by Long Beach during the conservatorship were null and void.[69] Even apart from the justification for the conservator's appointment, these contentions cannot support petitioners' suit.

a. *The demands for damages.* Petitioners seek damages from the conservator, the Home Loan Bank Board and its members, the Federal Savings and Loan Insurance Corporation, and the Federal Home Loan Bank of San Francisco, for the alleged injuries resulting from the appointment of the conservator and his conduct in office. It is, however, settled doctrine that no suit for damages may be maintained against administrative officers of the United States for action taken within the general scope of their authority. *Spalding* v. *Vilas*, 161 U.S. 483, 498; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S.

[69] This refers in particular to the $7,300,000 loan from San Francisco.

682, 687, fn. 7; *Cooper* v. *O'Connor,* 99 F. 2d 135 (C.A. D.C.); *Adams* v. *Home Owners' Loan Corporation,* 107 F. 2d 139 (C.A. 8); *Jones* v. *Kennedy,* 121 F. 2d 40, 42-43 (C.A. D.C.), certiorari denied, 314 U.S. 665; *Gregoire* v. *Biddle,* 177 F. 2d 579, 580 (C.A. 2), certiorari denied, 339 U.S. 949. And this rule exempting public officials from damage suits applies even when the complaint alleges, as here, that the officials had acted from personal spite, fully aware that they had no right to do the challenged act (*Gregoire* v. *Biddle, supra,* at 580), or that their statements were knowingly false or wrong. *Barsky* v. *United States,* 167 F. 2d 241, 250 (C.A. D.C.), certiorari denied, 334 U.S. 843. The policy behind this rule is the deliberate choice that it is "better to leave unredressed the wrongs done by dishonest officers[70] than to subject those who try to do their duty to the constant dread of retaliation" (Learned Hand, J., in *Gregoire* v. *Biddle, supra,* at 581).[71] The same considerations

[70] The pleadings in the instant cases do not contain any charge that any of the respondents has used his official position for personal monetary gain.

[71] Since this limitation on the right to recover damages from public officials is a matter of substantive law (*Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 687 n. 7), the application of this rule to the Federal Home Loan Bank of San Francisco is not foreclosed by the circumstance that San Francisco is a corporation endowed with the power to sue and to be sued. For a Federal Home Loan Bank, like a Federal Land Bank, is an instrumentality of the Federal Government engaged in the performance of an important governmental function, *viz.*, providing reserve facilities for home financing institutions (supra, pp. 7-8). *Federal Land Bank* v. *Priddy,* 295 U.S. 229, 231; *Federal Land Bank* v. *Bismarck Co.,* 314 U.S. 95, 102. To subject it to liability for an alleged tortious execution of its functions would interfere with its functions as a

apply to petitioners' demand for an accounting.[72]

b. *The prayer for a declaratory judgment.* In addition to damages, petitioners sought a decree declaring that all commitments and transfers made by the conservator were without authority and of no legal force and effect.

(i). The acts performed by the conservator bound Long Beach since he was, at the very least, a *de facto* officer. The basic authority of the Federal Home Loan Bank Administration to appoint the conservator, and his official status, were established in *Fahey* v. *Mallonee*, 332 U.S. 245, and *Ex*

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federal instrumentality just as effectively as if it were a natural person. *Federal Land Bank* v. *Priddy, supra*, at 237, and see *Atchley* v. *Tennessee Valley Authority*, 69 F. Supp. 952 (N.D. Ala.).

[72] Cf. *Lucking* v. *Delano*, 122 F. 2d 21, 29 (C.A. D.C.). The regulations of the Home Loan Bank Board provide that the conservator file a report when relieved from his duties and that his accounts will be audited by the Board. 24 C.F.R. (Pocket Supp. 1952) 149.9. These requirements have been complied with. Petitioners' attacks on this account are essentially based on the theory that the conservator had no authority to perform any act on behalf of Long Beach.

The district court directed, in its order of January 23, 1948, *supra*, p. 21, that the conservator file an account. This was done, although at no time was the jurisdiction of the district court to enter such an order conceded. As pointed out above, this account has been attacked on the ground that Ammann had no authority whatever to deal with the property of Long Beach. In so far as the filing of this account could be deemed to have a bearing upon the legal issues before the court below, it is clear that these interlocutory orders can be considered no more than the law of the case, and, as the proceedings were thereafter *in fieri*, all questions were still open, despite any failure to appeal. See *United States* v. *U. S. Smelting Co.*, 339 U.S. 186, 198-199. Further, since the accounting gave rise to the same issues as the undetermined merits of the case, the order directing it could not, in any view, become *res judicata*. *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120, 127; *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68.

Parte Fahey, 332 U.S. 258, 260. Petitioners' allegations of the illegality of the Ammann appointment are not based upon anything appearing on the face of the order establishing the conservatorship, but arise from the secret fraudulent motives supposedly underlying the administrative action (*supra,* pp. 19, 23). Ammann, therefore, clearly had at least the status of a *de facto* officer and his transactions were protected by the familiar rule regularizing transactions with *de facto* officers. The mischief—of which this case may properly be considered the ultimate example—which would result if the countless acts [73] of such an officer could subsequently be challenged for lack of authority requires that such challenges be rejected. *Cocke* v. *Halsey,* 16 Pet. 71, 87-88; *County of Ralls* v. *Douglass,* 105 U.S. 728, 730; *Norton* v. *Shelby County,* 118 U.S. 425, 441; *McDowell* v. *United States,* 159 U.S. 596, 601; *Waite* v. *Santa Cruz,* 184 U. S. 302; *Rockingham County* v. *Luten Bridge Co.,* 35 F. 2d 301 (C.A. 4).[74]

(ii). Another conclusive barrier is the fact that petitioners failed to exhaust their administrative remedy; hence, their recourse to judicial relief was premature. Under the regulations issued by the Home Loan Bank Board and its predecessors (24 C.F.R.) (Pocket Supp. 1952) 148.2 (formerly 24 C.F.R. (Cum. Supp. 1944) 206.2)), the Association had the right to apply for an administrative

[73] Ammann's account contained some 150,000 transactions (*supra,* p. 22, fn. 49).

[74] *Hutchins* v. *Pacific Mutual Life Ins. Co. of California,* 20 F. Supp. 150 (S.D. Cal.), affirmed, 97 F. 2d 58 (C.A. 9), applies the *de facto* officer doctrine to the conservator and liquidator of an insurance company.

hearing within fourteen days after the appointment of the conservator. The Long Beach management availed itself of this opportunity; the Home Loan Bank Administration granted the hearing and gave every interested party opportunity to join the proceedings (12511 R. 11629). Instead, petitioners Mallonee *et al.* obtained an injunction enjoining the administrative hearing and the Long Beach management subsequently joined (*supra*, p. 18, fn. 45) in the successful attempt to enjoin the administrative proceedings it had requested. When the injunction was finally lifted, both petitioners requested an indefinite postponement of the administrative hearing.[75]

Petitioners are not entitled to judicial relief before they have exhausted the prescribed administrative remedy. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50-51; *Macauley* v. *Waterman SS Corp.*, 327 U.S. 540; *Far East Conference* v. *United States*, 342 U.S. 570.[76] Nor would this administrative hearing have been a mere formality. It must be presumed that petitioners would have been granted a fair hearing which might possibly have disposed of the entire controversy without resort to the courts. *Fahey* v. *Mallonee*, 332 U.S. 245, 256. In any event, the hearing would have permitted a preliminary determination before the expert tribunal

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[75] None of the petitioners in this case or any of the cases before this Court was denied an administrative hearing. *Supra*, p. 20, fn. 48.

[76] It does not matter that this administrative remedy is provided by regulation rather than by statute. *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 123; *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282, 286 (C.A. D.C.), certiorari denied, 305 U.S. 625.

which either would have given petitioners the desired relief or permitted the making of an administrative record on which any judicial review could be based. *Fahey* v. *Mallonee,* 332 U.S. 245, 254, 256; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752, 767; *United States* v. *Jones,* 336 U.S. 641, 673.[77]

(iii). The relief sought by petitioners also constitutes an unwarranted collateral attack on the order appointing the conservator. The theory of petitioners' pleadings is that title to property transferred by the conservator to others actually remained with Long Beach since, in view of the illegality of his appointment, he had no power to convey Long Beach's property and that, consequently, this action "to enforce legal and equitable claims to property" has to pass on the question of the validity of the conservator's appointment.

This, however, cannot be done in the guise of an ordinary property action. Petitioners cannot circumvent the rule requiring the exhaustion of administrative remedies by framing their pleadings so as to make the validity of the administrative action an incidental question subject to judicial reexamination. A person who has failed to avail himself of the appropriate administrative remedies to challenge the validity of administrative action cannot attack the validity of the order in an independent legal proceeding. *Yakus* v. *United States,* 321 U.S. 414, 443-444, and authorities cited there.

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[77] The circumstance that the removal of the conservator has now obviated the administrative hearing does not improve petitioners' position. *Yakus* v. *United States,* 321 U.S. 414, 444-445; *Lichter* v. *United States,* 334 U.S. 742, 791-792.

In another lawsuit, the order must be considered as valid until it is set aside in the appropriate proceedings. The collateral action may not be bottomed on the theory that the order is void. To hold otherwise would be intolerable and destructive to orderly administrative procedure.[78] *Adams* v. *Nagle,* 303 U.S. 532, 540, 543; *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U. S. 682, 695.

(iv). Whether or not a conservator should be appointed for a Federal Savings and Loan Association raised delicate questions involving specialized knowledge, judgment, and discretion. In the related field of national banks it has been held that the decisions of the Comptroller of the Currency, including the appointment of a receiver, are not subject to judicial review, since such problems have been referred to his, and not the court's, judgment and discretion. *Kennedy* v. *Gibson,* 8 Wall. 498, 504-505; *Casey* v. *Galli,* 94 U. S. 673; *Bushnell* v. *Leland,* 164 U. S. 684, 685; *Adams* v. *Nagle,* 303 U. S. 532, 540; *United States Savings Bank* v. *Morgenthau,* 85 F. 2d 811, 814 (C.A. D.C.), certiorari denied, 299 U. S. 605; and see *United States* v. *Jones,* 336 U. S. 641, 652. This Court has pointed out that the only possible exception to the rule is the case of an actual fraud (*Adams* v. *Nagle,* 303 U. S. 532, 541-542), *i.e.,* personal corruption or

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[78] It is significant that the decisions upholding the action of a *de facto* officer have occasionally used the argument that the validity of the officer's appointment may not be attacked collaterally. *Cocke* v. *Halsey,* 16 Pet. 71, 87; *Waite* v. *Santa Cruz,* 184 U.S. 302, 323.

breach of trust for personal gain,[79] neither of which is involved in the instant case. The synthetic allegations of fraud pleaded in the instant case—the making of findings in the knowledge that they are false—fall short of this test. This rule governing national banks would appear to apply with equal force to Federal Savings and Loan Associations. Accordingly, the pleadings in the instant case fail to establish any basis for judicial review, even if such review were properly available in this action.

3. We have shown (*supra*, pp. 32-42) that the *Mallonee* complaint and the *Long Beach* cross-claim do not state claims giving rise to relief which can be awarded in this suit. These grounds suffice to show that the district court erred in granting the injunction. There are, in addition, other reasons supporting the ruling of the court below.

a. Order No. 2015 (the execution of which was enjoined) provided for a hearing in Washington; it was issued in Washington by the members of the Home Loan Bank Board, none of whom had been served personally in this action. The district court thus plainly lacked jurisdiction to issue the injunction. *Blackmar* v. *Guerre*, 342 U. S. 512.

Nor did the district court acquire jurisdiction over the Board members by virtue of service pursuant to 28 U. S. C. 1655 (Stat. App. p. 3) on the theory that this action sought to enforce a claim to property, etc. Section 1655 provides, by its

[79] See, *e.g.*, *Baker* v. *Schofield*, 243 U.S. 114; *Village of Brookfield* v. *Pentis*, 101 F. 2d 516 (C.A. 7).

very terms, that, in the absence of personal appearance, an adjudication made under it shall be limited to the property which is the subject matter of the action; hence, it authorizes only judgments which are strictly *in rem*. And it has been settled beyond doubt that such service cannot be the basis for any type of personal, and in particular injunctive, relief. *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, 368-369, affirming 179 Fed. 245, 252 (C. C. S. D. Tenn.); *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 279-281; *Clarke* v. *Boysen*, 39 F. 2d 800, 815 (C.A. 10), certiorari denied, 282 U. S. 869; *Findlay* v. *Florida East Coast Ry. Co.*, 68 F. 2d 540, 542 (C. A. 5), certiorari denied, 292 U. S. 623; *Wilhelm* v. *Consolidated Oil Corp.*, 84 F. 2d 739, 745-746 (C. A. 10); *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, 125 F. 2d 288, 290 (C. A. 6).[80]

There is no merit to petitioners' claim that this

[80] Petitioners also claim jurisdiction over absent parties pursuant to 28 U.S.C. 1335 and 2361 (Stat. App., pp. 1, 5), because the absent parties had been brought into court by way of interpleader processes issued by other parties. But the nation-wide process in interpleader actions does not support cross-claims between the adverse claimants. *Hagan* v. *Central Avenue Dairy*, 180 F. 2d 502 (C.A. 9); *Great Lakes Auto Insurance Group of Chicago* v. *Shepherd*, 95 F. Supp .1, 3-5 (W.D. Ark.). And it is well established that exceptions to the general rule going back to Section 11 of the Judiciary Act of 1789 (1 Stat. 79) (now embodied in Rule 4(f), Federal Rules of Civil Procedure, and 28 U.S.C. 1391-1392 (Stat. App. pp. 2-3 and p. 28)), *viz.*, that a person shall not be sued in a federal court outside the district or state in which he resides, must be strictly construed. *Ladew* v. *Tennessee Copper Co.*, 179 Fed. 245, 250 (C.C. S.D. Tenn.), affirmed, 218 U.S. 357, 367-368; *Non-Magnetic Watch Co* v. *Association Horlogere*, 44 Fed. 6 (C.C. S.D. N.Y.); *Vidal* v. *South American Securities Co.*, 276 Fed. 855, 867 (C.A. 2).

defect was cured by a general appearance of the Board [81] or by application of *res judicata.*[82]

b. Nor can petitioners seek relief under Section 10 of the Administrative Procedure Act (Stat. (App., p. 5). Order No. 2051, directing the holding of a hearing, is not a final order within the meaning of that section (Sec. 10(c)). Moreover, the District Court for the Southern District of California is not a court of competent jurisdiction. *Blackmar* v. *Guerre,* 342 U. S. 512, 516. And in view of the highly technical and specialized character of the supervision of banks, Order No. 5012 falls in the discretionary class, expressly exempted from judicial revision by the introductory clause of Section 10 of the Administrative Procedure Act.

c. As to the merits of the injunction, it is obvious that the pendency of this action did not shift to the courts supervisory functions allocated by Congress to the Home Loan Bank Board.[83] And it is too

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[81] Petitioners construe the filing with the district court of Order No. 388, terminating the conservatorship, as a general appearance (Pet., p. 15, fn. 3). The filing of this Order plainly had no such effect. Further, Rule 12(b), Federal Rules of Civil Procedure, permits a party to defend a suit on the merits without waiving a reserved challenge to the jurisdiction of the court 2 Moore's *Federal Practice* (2nd ed.), pp. 2260-2264, and the authorities cited there.

[82] Pet. 43. We shall not burden this brief in opposition by a detailed examination demonstrating that the judgments upon which petitioners rely are merely interlocutory decisions or judgments involving different issues and parties. This issue was thoroughly briefed in the court below.

[83] Section 5 of the Home Owners' Loan Act of 1933 (Stat. App., p. 18), dealing with Federal Savings and Loan Associations, has been amended as recently as July 14, 1952, 66 Stat. 604. Congress has not seen fit to change the methods of supervising these associations, although as petitioners have pointed out, this litigation has repeatedly been brought to congressional attention.

well established to warrant detailed discussion that the mere holding of an administrative hearing does not inflict irreparable injury. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52.

4. Of the many other contentions raised in the petition, we believe that only two require additional discussion. Petitioners claim that since the decision of the Court of Appeals was based primarily on their failure to exhaust their administrative remedy, the opinion should have left room for a retention of the case on the district court docket, rather than call for the outright dismissal of the proceedings. First, it is plain that petitioners have forfeited by now their right to administrative relief. *Yakus* v. *United States*, 321 U.S. 414; *Lichter* v. *United States*, 334 U.S. 742, 792. Apart from this, the question whether or not a case should be retained on the district court docket is a question largely governed by businesslike considerations. *Far East Conference* v. *United States*, 342 U.S. 570, 577. Since judicial review of the administrative determination, if any is had, would be on the administrative record in a court other than the Southern District of California, a dismissal of this case with its unmanageable record obviously is the practical solution.

b. Petitioners claim that the decision below leaves undetermined the claim of the Long Beach shareholders against the Federal Savings and Loan Insurance Corporation.[84] Section 405 of the Na-

[84] Service on the Federal Savings and Loan Insurance Corporation was attempted to be made on the basis of the Federal Interpleader Statutes (28 U.S.C. 1335, 2361). This presup-

tional Housing Act of 1934 (Stat. App., p. 25), however, provides that the insurance of accounts by the Federal Savings and Loan Insurance Corporation becomes due only "in the event of a default by any insured institution." Long Beach is not in default and any claims on this score are premature.

CONCLUSION

This long protracted and baseless litigation should end. The decision below is correct; there is no conflict of decisions; and no need for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1953.

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poses diversity of citizenship as defined in 28 U.S.C. 1332. The Federal Savings and Loan Insurance Corporation, incorporated under a corporation act of Congress, is a citizen of the United States, not of a state. *Bankers Trust Co.* v. *Texas & Pacific Ry. Co.*, 241 U.S. 295, 309-310; *Texas* v. *Interstate Commerce Comm.*, 258 U.S. 158, 160. Hence, the service was ineffective for lack of interpleader jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 592

WILMINGTON FEDERAL SAVINGS & LOAN ASSOCIATION, AND W. I. GILBERT, JR., FOR THEMSELVES AND ON BEHALF OF FEDERAL HOME LOAN BANK OF LOS ANGELES, AND ITS STOCKHOLDERS, PETITIONERS

v.

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN AND GEORGE K. BRAMLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LAROQUE, HEISLER, AND BRAMLEY IN OPPOSITION[1]

OPINIONS BELOW

a. *Home Loan Bank Board v. Mallonee (the*

[1] The parties represented by the Solicitor General pursuant to R. S. 361 (5 U.S.C. 306) are:

1. A. V. Ammann and George K. Bramley, formerly Conservator and Assistant Conservator, respectively, of Long Beach Federal Savings and Loan Association.

2. William K. Divers, J. Alston Adams, and Kenneth G.

Long Beach action).[2]—The oral opinion of the United States District Court of the Southern District of California (12511 R. 11146-11165) has not been reported. The opinion of the United States Court of Appeals for the Ninth Circuit (12511 R. 11503-11640) has been reported at 196 F. 2d 336.

b. *Fahey v. O'Melveny & Myers (the Los Angeles action).*[3]—The oral opinion of the United States District Court for the Southern District of California (12591 R. 833-847) has not been reported. The opinion of the United States Court of

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Heisler, members of the Home Loan Bank Board, and O. K. LaRoque, former member of the Home Loan Bank Board. The Home Loan Bank Board also has been made a party although it is not a corporate entity authorized by Congress to be sued. Federal Home Loan Bank Act, Sec. 17, as amended by Reorganization Plan No. 3 of 1947, Statutory Appendix, hereafter referred to as Stat. App., pp. 26-28. Cf. *Blackmar* v. *Guerre*, 342 U.S. 512, 515.

3. Federal Savings and Loan Insurance Corporation.

Federal Home Loan Bank of San Francisco, although a federal instrumentality, is represented by private counsel.

John H. Fahey was Home Loan Bank Commissioner and subsequently a member of the Home Loan Bank Board until his resignation on December 20, 1947. Mr. Fahey died on November 19, 1950. His successors in office and the Home Loan Bank Board have been substituted for him under Rule 25(d), Federal Rules of Civil Procedure. On November 20, 1952, Mr. Justice Douglas, in chambers, denied an application by petitioners to vacate the Court of Appeals' stay of proceedings in the district court, so that petitioners might apply to the district court to substitute the members of the Home Loan Bank Board for Mr. Fahey in his personal capacity. 97 L. Ed. Adv. No. 2, p. 117. No attempt, however, has been made to substitute his personal representatives. Accordingly, the action has abated as against Mr. Fahey in his personal capacity (Rule 25(a), Federal Rules of Civil Procedure).

[2] The record of this case will be referred to as "12511 R."

[3] The record of this case will be referred to as "12591 R."

Appeals for the Ninth Circuit (12591 R. 878-1032) is reported at 200 F. 2d 420.

c. Earlier stages of this litigation which have been before this Court include *Fahey* v. *Mallonee*, 332 U.S. 245, and *Ex Parte Fahey*, 332 U.S. 258.

JURISDICTION

a. *Home Loan Bank Board v. Mallonee.*—The judgment of the Court of Appeals was entered on April 2, 1952 (12511 R. 11641-11642). Petitions for rehearing filed on May 1, 1952, were denied on November 13, 1952 (12511 R. 11684). The petition for a writ of certiorari was filed on February 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

b. *Fahey v. O'Melveny and Myers.*—The judgment of the Court of Appeals was entered on November 6, 1952 (12591 R. 1033). Petitions for rehearing filed on December 6, 1952, were denied on December 17, 1952 (12591 R. 1036). The petition for a writ of certiorari was filed on February 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, since Federal Home Loan Banks are heavily subsidized instrumentalities of the Federal Government and the Act creating such banks expressly reserves to the Home Loan Bank Board the power to readjust their districts and to terminate their corporate existences, such banks and their members have vested rights to their continued corporate existences.

2. Whether the dissolution of a Federal Home Loan Bank can be attacked collaterally in proceedings charging that the dissolution was a fraud on the rights of the corporation and its members.

3. Whether a district court has jurisdiction to maintain an action *in rem* if the complete disposition of the dispute requires positive official action by absent government officials who are not subject and have not submitted to the court's jurisdiction.

4. Whether a district court may award fees to an attorney, prior to the successful conclusion of the lawsuit, out of a fund which does not belong to his client and which was not created by the efforts of the client or his attorney.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the separate Statutory Appendix (Stat. App.).

STATEMENT

1. *The underlying litigation.* On March 29, 1946, the Federal Home Loan Bank Commissioner,[4] acting pursuant to Sections 3, 25, and 26 of the Home Loan Bank Act,[5] and finding that the proposed action would "aid the efficient and economic accomplishment of the Act", issued three orders (Nos. 5082, 5083, and 5084; 12511 R. 11614-11617) which readjusted the territory of the Eleventh Federal Home Loan Bank District (Portland)[6] so as to

[4] The predecessor in office of the present Home Loan Bank Board (12511 R. 11611-11612).

[5] Stat. App., pp. 7, 17-18.

[6] The Eleventh District covered the northern part of the Pacific and mountain states.

include the Twelfth District (Los Angeles),[7] moved the Federal Home Loan Bank of Portland to San Francisco and renamed it the Federal Home Loan Bank of San Francisco. The orders also provided for the transfer of the assets, liabilities and members of Los Angeles to San Francisco and for the dissolution of Los Angeles.

On August 22, 1946, a complaint was filed in the United States District Court for the Southern District of California by Los Angeles and six of its member Federal Savings and Loan Associations, including petitioner Wilmington Federal Savings and Loan Association (hereafter referred to as Wilmington), challenging the dissolution of Los Angeles (12511 R. 9465-9497; 9501). The first count of the complaint challenged the dissolution of Los Angeles as an unlawful, unauthorized, and arbitrary act amounting to a fraud upon the rights of the plaintiffs. In the second count, the member associations, suing in behalf of all similarly situated members of Los Angeles, alleged that certain of their individual rights had been injured by the redistricting of Los Angeles. The claims were in substance that the substitution of San Francisco for Los Angeles as bailee and pledgee for securities bailed or pledged with Los Angeles constituted a trespass, a fraud in law, and an invasion of plaintiffs' right. Similar allegations were made with respect to the substitution of San Francisco stock for the Los Angeles stock previously held by them.

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[7] The Twelfth District covered the southern part of the Pacific and mountain states and the Territory of Hawaii.

The complaint was cast in the form of an action to remove a cloud from title; hence, service upon the members of the Federal Home Loan Bank Administration was attempted to be made under 28 U.S.C. 1655 (Stat. App., p. 3).[8]

2. *The order for payment of attorneys' fees forming the basis of this petition.* During the pendency of this action, the district court awarded substantial sums, going into the hundreds of thousands of dollars (12591 R. 980), as interim attorneys' fees, which were paid out of the funds in the registry of the court.[9]

On June 19, 1950, the district court entered an order (12591 R. 288-312) awarding an interim counsel fee of $67,500 to the attorneys for the Los Angeles Bank (O'Melveny and Myers) and of $7,500 to the attorney for petitioner Wilmington (Gilbert). The stated reason for this order was that due process required that the plaintiff corporations be represented by counsel and that the court had the inherent power to make all necessary and appropriate orders to insure due process in the administration of justice (12591 R. 308, 898 fn.). The court ordered that the interim fees totalling

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[8] Our brief in opposition in No. 591 (pp. 5-28) contains a more detailed description of the Federal Home Loan Bank system and of the complex of litigation of which this action (i.e., the so-called *Los Angeles* suit) forms a part.

[9] *Ex Parte Fahey*, 332 U.S. 258, expressly refused to pass on the propriety of the awards and merely held that applicants' grievance was to be pursued by appeal rather than by resort to this Court's original jurisdiction to issue an extraordinary writ.

$75,000 be paid out of funds in the registry of the court (12591 R. 310).[10]

The Court of Appeals reversed the order awarding the counsel fees. It held that, in view of the governmental and peculiar statutory character of the Federal Home Loan Banks, neither they nor their members had a vested interest in their continued existence; that since full relief to the plaintiffs would require official action to be taken by the Home Loan Bank Board, the latter was an indispensable party, and that the court lacked personal jurisdiction over this indispensable party; that the suit was in effect an unconsented suit against the United States; and, finally, that it was improper to award these fees prior to a determination of the merits of the case. It reversed the order with instructions to dismiss the entire action for lack of jurisdiction (12591 R. 1032).

Neither the Los Angeles Bank nor O'Melveny and Myers, its attorneys, nor five out of the six original plaintiff member associations, is seeking review of this judgment.

ARGUMENT

Petitioners seek review of the decision below because, as they allege, it deprives Los Angeles [11] and

[10] These funds were created by the various interpleaders and by the San Francisco impound (see brief in opposition in No. 591, pp. 14-17 and 22-23; 12591 R. 305-306; 883-889).

[11] There is a serious question as to whether restoration of Los Angeles is still open, inasmuch as Los Angeles is not seeking review of the decision below. Petitioners have filed this petition on behalf of Los Angeles. Wilmington's complaint, however, was not brought as a derivative stockholder's action

its stockholders of their rights to the continued existence of the bank. But the decision below, that petitioners had no vested right to the continued existence of the Los Angeles Bank and that indispensable parties were not before the district court, is clearly correct. The answer to petitioners' contentions is that (a) the Home Loan Bank Board had authority to dissolve Los Angeles and that any rights Los Angeles and petitioners had were subject to that power, (b) the complaint constitutes a collateral attack on administrative orders, (c) the complaint fails to state any basis upon which judicial review of the orders can be predicated, and (d) the members of the Home Loan Bank Board are indispensable parties not subject to the *in personam* jurisdiction of the court and not before the court.[12]

1. Despite petitioners' contentions, the Federal Home Loan Banks are not private banking ventures. Like the Federal Land Banks, they are instrumentalities of the Federal Government, per-

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(12511 R. 9465, 9485-9493), but to vindicate the injuries allegedly suffered by it individually. It does not contain any of the sworn statements required by Rule 23(b), Federal Rules of Civil Procedure. For the sake of convenience, and because of its effect upon the *Mallonee* action (see No. 591), we shall assume, without conceding, that the question of the restoration of Los Angeles is still in issue.

[12] An award of attorneys' fees payable out of funds in the registry of the court is appealable. *Trustees* v. *Greenough*, 105 U.S. 527, 527-528; *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 169. And on such appeal the appellate court may review not only the appropriateness of the award but also the jurisdiction of the trial court over the subject matter and over the parties. *Dubil* v. *Rayford Camp & Co.*, 184 F. 2d 899, 903 (C.A. 9); *Vicksburg, S. & P. Ry. Co.* v. *Nattin*, 54 F. 2d 712 (W.D. La.).

forming important governmental functions. *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102.

As we have pointed out in our brief in opposition in No. 591, pp. 7-8, Federal Home Loan Banks are heavily subsidized by the United States Government;[13] in return they are subject to the extensive supervisory powers of the Home Loan Bank Board.[14] Moreover, the Federal Home Loan Bank Act has expressly granted to the Board the power to readjust Federal Home Loan Bank Districts, to terminate the corporate succession of a Bank, and to liquidate or reorganize the Banks if it finds that the efficient and economic accomplishment of the purposes of the Act would be aided by such action.[15]

Congress obviously did not intend to confer upon Los Angeles a privilege of continued corporate existence protected by judicial remedies. Cf. *Stark* v. *Wickard*, 321 U. S. 288, 306. In becoming a member of Los Angeles, Wilmington entered this field of public banking fully aware of the governmental subsidies and the reserved powers of

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[13] At the inception of the litigation, the Federal Government owned more than 51% of the capital stock of Los Angeles (12591 R. 927).

[14] Federal Home Loan Bank Act, Sections 7, 12, 17, Stat. App., pp. 10, 13, 16.

[15] Federal Home Loan Bank Act, Sections 3, 25, 26, Stat. App., pp. 7, 17-18. It will be noted that most governmental instrumentalities and subdivisions have this precarious status even without these express statutory provisions. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394; *Trenton* v. *New Jersey*, 262 U.S. 182.

supervision and modification.[16] It cannot attack the exercise of this expressly reserved power on the ground that it would constitute an unconstitutional confiscation if applied to a completely private and uncontrolled corporation. *Fahey* v. *Mallonee*, 332 U. S. 245, 256.[17]

2. The complaint seeks collaterally to attack administrative orders and does not allege any ground upon which administrative orders of this type are

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[16] This reservation of powers was not confined to the Statutes at Large or the Federal Register. It was incorporated in the basic corporate documents of Los Angeles and of its stockholders. Los Angeles' certificate of incorporation (Sec. 7) provides in express terms that it shall have succession until dissolved by the Federal Home Loan Bank Board under the Federal Home Loan Bank Act or by further Act of Congress (12511 R. 4144, 4147). Similarly, the stock certificates of Los Angeles (12511 R. 9382) provide that they are subject to all the provisions of the Federal Home Loan Bank Act and any amendment or amendments thereof, and are subject to the rules and regulations of the Federal Home Loan Bank Board.

[17] The petition (pp. 23-25) makes an assertion—not contained in the complaint (cf. 12511 R. 9465 to 9496)—to the effect that at the time of its dissolution the stock of Los Angeles had a book value of $132 and that petitioner was deprived of the surplus of $32 per share by the merger of the Los Angeles and Portland districts. Since Wilmington held 84 shares in Los Angeles (12511 R. 9487), this alleged injury amounts to $2,688, a sum which is relatively insignificant considering that Los Angeles had a capital of $46,000,000 (Pet. 2). Moreover, petitioner's claim to the surplus of Los Angeles is of an extremely tenuous nature. Federal Home Loan Bank Act, Section 6(i) (Stat. App., pp. 9-10), indicates that a member of a Federal Home Loan Bank has no right to its undistributed surplus and is entitled only to the return of the cash paid subscription. And changes in the value of the stock are the necessary consequence of the reserved powers to readjust districts and to liquidate or reorganize banks. In any event, the alleged failure to protect petitioner's rights in the surplus of Los Angeles could not make the consolidation of Los Angeles and Portland into San Francisco an utter nullity. That, however, is the theory upon which Wilmington rests its complaint (12511 R. 9466).

judicially reviewable. As pointed out above, the complaint (cf. Pet. 5) is based on the theory that the consolidation of Los Angeles and Portland into San Francisco was void and a "fraud in law" upon plaintiffs' rights and asks for an adjudication to the effect that the orders of the Federal Home Loan Bank Administration did not accomplish a transfer of assets. As we have shown in our brief in opposition in No. 591, pp. 38-41, the law does not permit such collateral attacks upon administrative action.[18]

3. We have also shown in our brief in opposition in No. 591, pp. 41-42, that judicial review of administrative orders issued in the field of banking activities is extremely limited. Moreover, the administrative action involved in the instant case—the readjustment of Federal Home Loan Bank districts [19] and the determination that efficient and economical accomplishment of the purposes of the Act would be aided by the liquidation or reorganization of Los Angeles—is of the type with which courts rarely, if ever, interfere. For these decisions are complex and delicate, and involve large elements of proph-

[18] Inasmuch as Secs. 3, 25, 26 (Stat. App. pp. 7, 17-18) of the Home Loan Bank Act plainly authorize the administrative action here involved, there can be no review on the ground that it was beyond the statutory grant of authority (cf. *Board of Governors* v. *Agnew*, 329 U.S. 441, 444). An allegation that certain acts constituted fraud on the rights of petitioners is not sufficient to permit a collateral attack. *Adams* v. *Nagle*, 303 U.S. 532, 542.

[19] The circumstance that the Home Loan Bank District of San Francisco is substantially identical with the Federal Reserve District of San Francisco and the Ninth Judicial Circuit indicates that readjustment of the Federal Home Loan Bank districts was not capricious.

ecy, specialized knowledge, information, and experience, and rest upon considerations not entirely susceptible of proof or disproof. See Clark, *Central Banking Under the Federal Reserve System*, pp. 52, 53 [20]; cf. *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 598; *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551, 559; *United States* v. *Bush & Co.*, 310 U. S. 371, 380; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303; *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111.[21]

4. The court also lacked jurisdiction over indispensable parties. The members of the Home Loan Bank Board have not been served personally in

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[20] It is imperative that the districts be shaped in such a fashion that no single group desiring to obtain easy credit can obtain control of any reserve bank. Reed, *The Development of Federal Reserve Policy*, pp. 5-6. It is not at all improbable that the present dispute is intertwined with differences over the credit policies to be followed in the reconversion period. Political opposition to such readjustments was also expected. Congress therefore placed the authority for redistricting with the Board, hoping that it could remain free from political interference. 75 Cong. Rec. 14580.

[21] That federal control of banking involves "a congeries of imponderables * * * calling for almost intuitive special judgments" has been brought to the attention of Congress. Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 143. And it is significant that although the administrative action here attacked has been twice investigated by Congress and although Section 3 of the Home Loan Bank Act has been amended as recently as July 14, 1952 (66 Stat. 604), Congress has not curtailed the powers of the Home Loan Bank Board under Secs. 3, 25, and 26 of the Act.

The petitioners' reliance upon the Administrative Procedure Act is, in addition, misplaced since the instant proceedings were instituted prior to its effective date, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 583, and also in view of the essentially discretionary nature of the action sought to be reviewed. See Section 10 (Stat. App., p. 5).

California and have not submitted to the jurisdiction of the district court.[22] Service upon them was obtained solely pursuant to 28 U.S.C. 1655 (Stat. App., p. 3).[23] As we have pointed out in our brief in opposition in No. 591, pp. 42-43, such service supports only an adjudication limited to the property which is the subject matter of the proceedings; it does not confer jurisdiction upon the court to direct a judgment which requires the absent party to take any action.

A judgment limited to the enforcement of property rights, moreover, would not finally or completely dispose of this litigation. To the contrary, the dispute would remain suspended in mid-air unless the absent members of the Home Loan Bank Board take a number of steps which only they, and no one else, can perform. In order to be effective, the relief sought in the complaint requires the restoration and reactivation of Los Angeles and Portland, the dissolution of San Francisco, the readjustment of the Federal Home Loan Bank districts in the Pacific coast area, the appointment of new public directors for the reestablished banks in Los Angeles and Portland, the segregation of San

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[22] Under Rule 12(b) a challenge to the jurisdiction of the court is not waived by coupling it with defenses to the merits. Hence, the circumstance that the absent members participated in the defense in the several actions no longer operates as a general appearance. 2 Moore's *Federal Practice* (2d Ed.) pp. 2260-2264 and the authorities cited there. The cases cited by petitioners in support of their theory of waiver were decided prior to the effective date of the Federal Rules of Civil Procedure. See also *infra*, fn. 24, p. 14.

[23] See also our brief in opposition in No. 591, p. 43, fn. 80.

Francisco's assets, and the conduct of elections. These are but a few of the necessary steps which would not flow automatically from a decree, but would require either positive action by the Home Loan Bank Board or its consent under Section 12 of the Home Loan Bank Act. A decree which does not or cannot provide for such additional relief would "leave the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow*, 17 How. 130, 139. Necessarily, the Board members are indispensable parties. Since complete relief would require an *in personam* decree against them and since the court has no personal jurisdiction over them, the complaint is subject to dismissal. *Blackmar* v. *Guerre*, 342 U.S. 512. And, since the complete relief sought in the complaint would require the taking of official, discretionary action by government agencies, the proceedings are, in effect, an unconsented suit against the United States.[24] *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 691n, 693. Lack of jurisdiction on that ground cannot be cured by waiver (*United States* v. *Shaw*, 309 U.S. 495, 501) or through application of the doctrine of *res judicata* (*United States* v. *U.S.F. & G. Co.*, 309 U.S. 506, 514).

5. We have shown that the complaint is fatally defective as a matter of substance as well as for

[24] It was pointed out in *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451, 457 (C.A. 4), certiorari denied, 291 U.S. 674, that a suit to remove a cloud from title may not be used to test the validity of governmental action; and see *Lambert Co.* v. *Baltimore and Ohio R. R. Co.*, 258 U.S. 377, 381-383.

jurisdictional defects. Petitioner Gilbert, however, claims that he is entitled to the attorney's fee awarded to him regardless of the ultimate success or failure of the action.

The theory underlying the district court's order awarding the attorney's fees was that due process required adequate representation of all litigants before the court and that the court had the inherent powers necessary to carry out those requirements of due process (*supra*, pp. 6-7).[25] 28 U.S.C. 1915 (Stat. App., p. 4) contains detailed regulation of proceedings in *forma pauperis*. The privilege is limited to citizens and does not include corporations. *Quittner* v. *Motion Picture Producers and Distributors of America*, 70 F. 2d 331, 332 (C.A. 2). Attorneys requested to represent the poor person are entitled to compensation only out of the funds actually recovered by him. *Whelan* v. *Manhattan Ry. Co.*, 86 Fed. 219, 221 (C.C. S.D. N.Y.). It is difficult to harmonize the coexistence of the broad inherent powers claimed by the district court with this narrow express statutory provision.

Moreover, the award here of interim fees, regardless of the final outcome of the litigation, conflicts with the basic rule that an attorney must look for compensation only to the party employing him. *Oelrichs* v. *Spain*, 15 Wall. 211, 230; *Rude* v. *Buchhalter*, 286 U.S. 451, 459.

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[25] Since there are five other members of Los Angeles suing on behalf of all others similarly situated, it would seem that there was little need for the active participation of Wilmington in the proceedings.

There are exceptions to this rule, especially where a party representing a class has by its efforts succeeded in creating a fund [26] which will inure to the benefit of the entire class. In those circumstances the fees of the counsel for the successful party may be charged against the entire fund. But even this exception presupposes success in the litigation and does not permit the award of interim fees while the outcome of the litigation is still in doubt. *Trustees* v. *Grenough,* 105 U.S. 527, 537; *Hobbs* v. *McLean,* 117 U.S. 567, 581-582; *Sprague* v. *Ticonic Bank,* 307 U.S. 161, 167.

CONCLUSION

The decision below is correct; there is no conflict of decisions and no need for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys.

APRIL, 1953.

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[26] The funds in the registry of the court out of which the attorney's fees were paid represent money paid into court as the result of interpleaders and the San Francisco impound (*supra*, p. 6). None of these funds was obtained as the result of Wilmington's efforts, and not even by the widest stretch of imagination can any of Wilmington's funds be traced into the registry of the court. Cf. Pet., p. 10.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 280388 1448

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 593

HOME INVESTMENT CO., PETITIONER

v.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

The background of this petition has been set forth in our brief in opposition in No. 591, to which reference is hereby respectfully made.

The facts peculiar to this petition may be summarized as follows. Shortly after the appointment of the conservator, mortgages held by Long Beach on 174 lots owned by petitioner became due and payable. Petitioner tendered the final payments to the conservator, who thereupon requested the trustee under the mortgage deed to execute the

necessary releases. The trustee, Title Service Company, the *alter ego* of the management of Long Beach, claimed to have received instructions from Long Beach, *i. e.,* from itself, not to honor any requests from the conservator. Interpleader and intervention proceedings followed (see brief in opposition in No. 591, pp. 14-17). The actual machinery for settling these disputes was that the conservator and the former Long Beach management both instructed the trustee to reconvey the property to the borrower, who thereupon paid the money into court and received his reconveyance from the trustee. This was followed by an unnecessary and therefore redundant court order (12511 R. 523-533). This procedure was followed in about fifty cases while Long Beach was in the hands of the conservator.

The termination of the conservatorship put an end to the conflict of authority between the conservator and the management of Long Beach. The question as to whether the notes and trust deeds had been pledged validly to San Francisco was obviated, in so far as petitioner is concerned, shortly thereafter by the return of these securities to Long Beach (see brief in opposition No. 591, pp. 22-23).[1]

The decision of the Court of Appeals below indicated that petitioner's interpleader should have been dismissed because it sought collaterally to attack administrative action which the party directly affected could not have reviewed because of its

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[1] See particularly brief in opposition in No. 591, p. 23, n. 50. The San Francisco Bank's claim is for the recognition of a lien upon the property of Long Beach, and not upon the property of any borrower from Long Beach.

failure to exhaust its administrative remedy.[2] (12511 R. 11581-11582).

We submit that the decision below is correct and does not place any hardship upon petitioner since its payments to the conservator, who was at least a *de facto* officer, are protected under settled doctrine (see Brief in Opposition in No. 591, pp. 37-38). Beyond that, the decision below does not aggrieve petitioner nor any other person who took a mortgage from Long Beach. It will be noted that the proposed mandate submitted by the appellants in the court below (respondents here) (12511 R. 11642) does not make any reference to the proceedings brought by the homeowners and does not ask for the return to San Francisco of the pledges, notes, and trust deeds. Moreover, the trust deeds were reconveyed by the trustee pursuant to instructions given to him by the only two persons who possibly could have authority to do so; the homeowners' record title is clear regardless of the validity of the court proceedings.

The foreclosure proceedings referred to on page 37 of the petition do not affect petitioner's interest in any way. They were brought by San Francisco to enforce the notes given by Long Beach, and we repeat that San Francisco disclaims any rights to the pledged notes and trust deeds. There is no danger that petitioner or any other homeowner might be subjected to double payment or conflicting claims.

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[2] Petitioner, as an interested party, could have asked for leave to intervene in the administrative proceeding (12511 R. 11629).

In any event, the alleged adverse claims never presented a proper case for the exercise of the federal interpleader jurisdiction under 28 U. S. C. 1335. Prior to the termination of the conservatorship, the issue was not who owned the notes and trust deeds but who had the right to act for Long Beach. A dispute as to the person who properly represents a corporation does not present a proper case for an interpleader. *Amstelbank, N. V.* v. *Guaranty Trust Co.,* 177 Misc. 548; *Koninklijke Lederfabriek "O."* v. *Chase National Bank,* 177 Misc. 186, 191, affirmed, 263 App. Div. 815.

On the other hand, the claim that, in view of the contested validity of the pledge of the notes and trust deeds to San Francisco, the homeowners are confronted with two adversely claiming mortgagees, does not give rise to interpleader jurisdiction under 28 U. S. C. 1335, since the alleged adverse claimants, both federal corporations, do not have the required diversity of citizenship (see brief in opposition in No. 591, p. 43, fn. 80).

For the above reasons and for the reasons set forth in our briefs in opposition in Nos. 591 and 592, we respectfully submit that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 594

ERNEST R. UTLEY, AS RECEIVER FOR FEDERAL HOME LOAN BANKS OF LOS ANGELES, PORTLAND, OR SAN FRANCISCO, WHICHEVER EXISTS, PETITIONER

v.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

This petition is closely related to the litigation described in more detail in the briefs in opposition in Nos. 591 and 592, to which reference is respectfully made.

Petitioner is a receiver appointed for the limited

purpose of preserving property on deposit in the district court (Pet. 2). The theory underlying petitioner's appointment is that there might be claims against the conservator (Ammann), his bonding company, and the Federal Savings and Loan Insurance Company, arising from Ammann's management of Long Beach (Pet. 11-12). Moreover, since it was asserted that the identity of the true owners of the claim was alleged to be uncertain so long as the validity of the dissolution of the Los Angeles Bank and the creation of the San Francisco Bank remained undecided, petitioner was styled as indicated in the caption (Pet. 3).

The appointment took place on March 15, 1952 (Pet. 2), when both the *Los Angeles* and *Long Beach* cases were pending on appeal to the Court of Appeals. Petitioner was not a party to either appeal, except that he filed a petition for rehearing in the *Los Angeles* case, which was denied (Pet. 16).[1]

Not having been a party to the proceedings below, petitioner has no standing to file a petition for a writ of certiorari. *Bayard* v. *Lombard,* 9 How. 529, 550, 551; *Payne* v. *Niles,* 20 How. 219, 221; *Louisiana* v. *Jack,* 244 U. S. 397, 402; *Posner* v. *Anderson,* 293 U. S. 531.

It also appears (Pet. 16, 36) that petitioner is essentially concerned with the dismissal of the *Los Angeles* complaint with the result that any funds

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[1] Petitioner has expressly disclaimed any intention of becoming a party to the *Long Beach* proceedings (12511 R. 11645, 11649).

collected by him, as receiver, will go to San Francisco. It is, however, fundamental that a receiver, as an indifferent stakeholder, may not appeal an order deciding who is ultimately entitled to the stake. *Bosworth* v. *Terminal Railroad Association,* 174 U. S. 182; *Grier* v. *Union National Life Ins. Co.,* 217 Fed. 293 (E. D. Pa.); cf. *Spriggs* v. *Stone,* 174 F. 2d 671 (C. A. D. C.).

For these reasons, and for the reasons set forth in our briefs in opposition in Nos. 591 and 592, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 595

ROBERT H. WALLIS AND GEORGE TURNER, PETITIONERS

v.

FAHEY, AMMANN AS CONSERVATOR, HOME LOAN BANK BOARD, FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

The facts underlying these petitions have been outlined in our brief in opposition in No. 591, to which reference is respectfully made.

1. Wallis is an attorney representing Long Beach, who received a cashier's check shortly before Long Beach was placed in the hands of the conservator. He filed an interpleader on June 12,

1946 (12511 R. 86-100), alleging that he was subject to conflicting claims since the management of Long Beach insisted that he use the money to defend the Bank against the supervisory action by the Administration authorities in Washington, while the conservator, Ammann, prohibited the use of the funds for these purposes.

The court below indicated that this interpleader should have been dismissed on account of Long Beach's failure to exhaust its administrative remedies. We submit that the decision below was correct for the reasons set forth in our memorandum in No. 593.

In addition, we point out that petitioner's allegations do not bring him within the Federal Interpleader Statute (28 U.S.C. 1335 (Stat. App. p. 1)). The pleading itself states that the Long Beach management does not claim the fund but insists that it belongs to Wallis. The interpleaded parties are therefore not adverse claimants. In any event, this litigation lost all practical importance with the termination of the conservatorship in 1948.

2. The Turner interpleader is even more anomalous. Turner is the lessee of a building owned by Long Beach. One of the charges which led to the appointment of the conservator was that the rent reserved in the lease was inadequate. Five days after the termination of the conservatorship in January 1948, Turner paid into court the rent which had accrued while Long Beach was managed by the conservator and filed a cross-claim in inter-

pleader, averring that the propriety of the lease had been questioned in a stockholders' action filed by Newendorp and Bradley in a state court, allegedly in conspiracy with the former conservator (12511 R. 3477), and asking for a declaration that Turner's lease was a valid one. This obviously does not constitute an interpleader under 28 U.S.C. 1335, for there are no conflicting claimants to the fund deposited in court.

Moreover, the reason for the inclusion of respondents in these proceedings is nebulous unless Turner's seeking of a judicial declaration that his lease from Long Beach was proper was designed to foreclose supervisory action, based on the lease, by the authorities placed by Congress in charge of the supervision of Federal Savings and Loan Associations. Such a suit, however, may not be maintained, for the reasons set forth in our brief in opposition in No. 591, pp. 41-42, 44-45, especially since petitioner Turner has not availed himself of the administrative remedy available to him.[1]

For the above reasons, and for the additional reasons set forth in our briefs in opposition in Nos. 591 and 592, it is respectfully submitted that this petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

[1] Turner could have intervened in the administrative hearings ordered on June 5, 1946, 12511 R. 11629-11631.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 596

TITLE SERVICE COMPANY, TRUSTEE ON DEEDS OF TRUST OF 8,000 HOMEOWNERS, PETITIONER

v.

FAHEY, AMMANN AS CONSERVATOR, HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

The facts underlying this petition have been stated in our brief in opposition in No. 591 and in more detail in our memorandum in No. 593, to which reference is respectfully made.

Petitioner is the trustee of the deeds of trust executed by homeowners who borrowed funds from

Long Beach. It is the *alter ego* of the Long Beach management (12511 R. 11081, 11087, 11519), and its functions are purely formal.[1] After Ammann had been appointed conservator for Long Beach, Title Service received instructions from Ammann to execute reconveyances to homeowners who had paid off their mortgages to him, and "warnings" from the Long Beach management, *i. e.*, from itself, to disregard Ammann's instructions. Title Service thereupon filed interpleader proceedings alleging that it was a trustee confronted with conflicting claims.[2]

The court below indicated that the interpleader should have been dismissed (12511 R. 11577, 11582). We submit that this decision was correct for the reasons set forth in our memorandum in No. 593.[3] There is no possibility that in the future petitioner may be subject to any conflicting claims arising from the conservatorship or to liability for the releases executed in the past.

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[1] If the security given by the homeowners had taken the form of a mortgage rather than that of a trust, the mortgage could have been given directly to Long Beach, obviating the interposition of a trustee.

[2] As we have pointed out in our memorandum in No. 593, p. 4, uncertainty as to who has authority to represent a corporation cannot be the basis of a federal statutory interpleader (28 U.S.C. 1335) authorizing service throughout the United States (28 U.S.C. 2361).

[3] The point made by the court below that Title Service is bound by the failure of Long Beach to exhaust its administrative remedy becomes even more cogent in view of the practical identity between petitioner and the management of Long Beach.

For the above reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

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The pertinent sections of Title 28 United States Code provide:

§ 1332. Diversity of citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States:

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories and the District of Columbia.

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of

this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

§1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do busines or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

§ 1392. Defendants or property in different districts in same State

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

(b) Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.

§ 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

§ 1655. Lien enforcement; absent defendants

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

* * * * *

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

* * * * *

§ 1915. Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

* * * * *

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

* * * * *

§ 2361. Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

The Administrative Procedure Act, Section 10, 60 Stat. 237, 243, 5 U.S.C. 1009, provides in pertinent part:

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any

special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every

reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

* * * * *

The Federal Home Loan Bank Act (47 Stat. 725, 12 U.S.C. 1421-1449) provides in pertinent parts:

Section 3, 47 Stat. 726, as amended by the Act of July 14, 1952, sec. 10(c), 66 Stat. 604, 12 U.S.C. 1423:

SEC. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, Guam, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may

be designated by the board. Its title shall include the name of the city at which it is established.

Sec. 6, 47 Stat. 727, 12 U.S.C. 1426:

SEC. 6. (a) As soon as practicable after the enactment of this Act, the board, with the approval of the Secretary of the Treasury, shall determine the minimum capital of each Federal Home Loan Bank which shall be not less than $5,000,000. The board shall, as soon as practicable thereafter, open books in each district established under section 3 for subscription to the capital stock of the Federal Home Loan Bank of the district.

* * * * *

(f) The Secretary of the Treasury shall subscribe, on behalf of the United States, for such part of the minimum capital of each Federal Home Loan Bank as is not subscribed for by members under subsection (c) of this section within thirty days after books have been opened for stock subscriptions as provided in subsection (a). Payments for stock subscriptions by the Secretary of the Treasury shall be subject to call in whole or in part by the board, with the approval of the Secretary of the Treasury, at such time or times as may be deemed advisable. Each Federal Home Loan Bank receiving such payments shall issue receipts therefor to the Secretary of the Treasury, and such receipts shall be evidence of the stock ownership of the United States. The aggregate amount expended by the United States

for the purchase of stock under this Act shall not exceed $125,000,000. The Reconstruction Finance Corporation Act, approved January 22, 1932, is amended by adding at the end of section 2 thereof the following new paragraph:

"In order to enable the Secretary of the Treasury to make payments upon stock of the Federal Home Loan Banks subscribed for by him in accordance with the Federal Home Loan Bank Act, the sum of $125,000,000, or so much thereof as may be necessary for such purpose, is hereby allocated and made available to the Secretary of the Treasury out of the capital of the corporation and/or the proceeds of notes, debentures, bonds, and other obligations issued by the corporation. For the purposes of this paragraph, the corporation shall issue such notes, bonds, debentures, and other obligations as may be necessary."

* * * * *

(h) Stock subscribed for otherwise than by the United States, and the right to the proceeds thereof, shall not be transferred or hypothecated except as hereinafter provided and the certificates therefor shall so state.

(i) Any member may withdraw from membership in a Federal Home Loan Bank six months after filing with the board written notice of intention so to do, and the board may, after hearing, remove any member from membership, or deprive any nonmember borrower of the privilege of obtaining further advances, if, in the opinion of the board, such member or nonmember borrower has failed to comply with

any provision of this Act or the regulations of the board made pursuant thereto or if, in the opinion of the board, such member or nonmember borrower is insolvent. In any such case, the indebtedness of such member or nonmember borrower to the Federal Home Loan Bank shall be liquidated, and the capital stock in the Federal Home Loan Bank owned by such member shall be surrendered and canceled. Upon the liquidation of such indebtedness such member or nonmember borrower shall be entitled to the return of its collateral, and upon surrender and cancellation of such capital stock, the member shall receive a sum equal to its cash paid subscriptions for the capital stock surrendered, except that if at any time the board finds that the paid-in capital of a Federal Home Loan Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Federal Home Loan Bank shall on the order of the board withhold from the amount to be paid in retirement of the stock a pro rata share of the amount of such impairment as determined by the board.

Sec. 7, 47 Stat. 730, as amended by the Act of May 28, 1935, 49 Stat. 294, 12 U.S.C. 1427:

SEC. 7. (a) The management of each Federal Home Loan Bank shall be vested in a board of twelve directors, all of whom shall be citizens of the United States and bona fide residents of the district in which such bank is located.

(b) Four of such directors shall be appointed by the Board and shall hold office for terms of four years; except that the terms of

office of the two such directors heretofore appointed shall expire at the end of the calendar years 1936 and 1937, respectively, and the terms of office of the first two such directors hereafter appointed shall expire at the end of the calendar years 1938 and 1939, respectively.

(c) Six of such directors, two of whom shall be known as class A directors, two of whom shall be known as class B directors, and two of whom shall be known as class C directors, shall be elected as provided in subsection (e), and shall hold office for terms of two years; except that the terms of office of the directors heretofore elected or appointed shall expire at the end of the terms for which they were elected or appointed.

(d) Two of such directors shall be elected by the members of the Federal Home Loan Bank without regard to classes under rules and regulations to be prescribed by the Board, and shall hold office for terms of two years; except that the term of office of one of the directors first elected under this subsection shall expire at the end of the calendar year 1936.

(e) The board shall divide all the members of each Federal Home Loan Bank into three groups which shall be designated groups A, B, and C, which groups shall represent, respectively, and as fairly as may be, group A, the large, group B, the medium-sized, and group C, the small members, the size of such members to be determined according to the aggregate unpaid principal of the member's home mortgage loans. The board may revise the member-

ship of such groups from time to time. Of the directors elected as hereinafter provided, each class A director shall be an officer or director of a member in group A, each class B director shall be an officer or director of a member in group B, and each class C director shall be an officer or director of a member in in group C. Each member shall be entitled to nominate suitably qualified persons for election as directors of the class corresponding to the group to which such member belongs, and shall cast one vote for each director in its class. The directors of each class shall be nominated and elected in accordance with such rules and regulations as may be prescribed by the board.

(f) Any director appointed or elected as provided in this section to fill a vacancy shall hold office only until the expiration of the term of his predecessor.

(g) The board shall designate one of the directors of each bank to be chairman, and one to be vice-chairman, of the board of directors of such bank.

(h) If at any time when nominations are required, members shall hold less than $1,000,000 of the capital stock of the Federal Home Loan Bank, the board shall appoint a director or directors to fill the place or places for which such nominations are required. A director so appointed shall serve until the expiration of the calendar year during which he takes office.

(i) Each bank may pay its directors reasonable compensation for the time required of

them, and their necessary expenses, in the performance of their duties, in accordance with the resolutions adopted by such directors, subject to the approval of the board.

(j) Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember borrower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations.

Sec. 12, 47 Stat. 735, 12 U.S.C. 1432:

SEC. 12. The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business,

but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain, and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules, and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this Act, as are customary and usual in corporations generally.

Sec. 13, 47 Stat. 735, as amended by the Act of May 28, 1935, 49 Stat. 295, 12 U.S.C. 1433:

SEC. 13. Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank

bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank.

Sec. 14, 47 Stat. 736, 12 U.S.C. 1434:

SEC. 14. When designated for that purpose by the Secretary of the Treasury, each Federal Home Loan Bank shall be a depositary of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as depositary of public money and financial agent of the Government as may be required of it.

Sec. 17, 47 Stat. 736, 12 U.S.C. 1437; cf. Reorganization Plan No. 3 of 1947 (see *infra*, pp. 26-28):

> SEC. 17. For the purposes of this Act there shall be a board, to be known as the "Federal Home Loan Bank Board", which shall consist of five citizens of the United States appointed by the President of the United States, by and with the advice and consent of the Senate. Not more than three members of the board shall be members of the same political party. Each member shall devote his entire time to the business of the board. Before entering upon his duties each of the members shall take an oath faithfully to discharge the duties of his office. The President of the United States shall designate one of the members of the board to serve for a term of two years, one for three years, one for four years, one for five years, and one for six years from the date of the enactment hereof, and thereafter the term of each member shall be six years from the date of the expiration of the term for which his predecessor was appointed. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the board shall receive a salary at the rate of $10,000 per annum: *Provided*, That during the fiscal year 1933 the salary shall be $9,000 per annum. The President shall designate one of the members as chairman of the board. The chairman shall be the chief executive officer of the board and in his absence or disability the duties of his office

shall be performed by some one of the other members to be designated as acting chairman by the chairman in such order as he may determine. The board shall supervise the Federal Home Loan Banks created by this Act, shall perform the other duties specifically prescribed by this Act, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this Act. The board shall have power to suspend or remove any director, officer, employee, or agent of any Federal Home Loan Bank, the cause of such suspension or removal to be communicated in writing forthwith to such director, officer, employee, or agent and to such Federal Home Loan Bank.

Sec. 25, 47 Stat. 740, 12 U.S.C. 1445:

SEC. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress.

Sec. 26, 47 Stat. 740, 12 U.S.C. 1446:

SEC. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the

payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part.

Section 5 of the Home Owners' Loan Act of 1933, 48 Stat. 128, 132, as amended by the Acts of April 27, 1934, Secs. 5, 6, 48 Stat. 645, 646; May 28, 1935, Sec. 18, 49 Stat. 297; Aug. 10, 1939, Title IX, Sec. 909, 53 Stat. 1402; Aug. 6, 1947, 61 Stat. 786; July 3, 1948, Sec. 1, 62 Stat. 1239; Oct. 20, 1951, Title III, Sec. 313(d), 65 Stat. 490; July 14, 1952, Sec. 12, 66 Stat. 604; 12 U.S.C. 1464 and Supp. V, provides in pertinent part:

> SEC. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.
>
> (b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such

borrowed money as may be authorized by regulations of the Board.

(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: *Provided,* That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further,* That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank: *And provided further,* That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter. In addition to the loans and investments otherwise authorized, such associations may purchase, subject to all the provisions of this paragraph except the area restriction, loans secured by first liens on improved real estate which are insured under the provisions of the National Housing Act, as amended, or insured as provided in the Servicemen's Readjustment Act of 1944, as amended. Notwithstanding any other provision of this subsection except the area restriction such associations may invest their funds in loans insured under title I of the

National Housing Act, as amended, loans guaranteed or insured as provided in the Servicemen's Readjustment Act of 1944, as amended (except business loans provided by section 503 thereof and not secured by a lien on real estate), or in other loans for property alteration, repair, or improvement: *Provided,* That no such loan shall be made in excess of $1,500 except in conformity to the other provisions of this subsection, and that the total amount of loans so made without regard to the other provisions of this subsection shall not, at any time, exceed 15 per centum of the association's assets.

(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the

Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one-third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code with respect to wages paid after December 31, 1939, for employment after such date, and ex-

cept, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

* * * * *

(j) In addition to the authority to subscribe for preferred shares in Federal savings and loan associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed

75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

* * * * *

The National Housing Act of 1934, Title IV, 48 Stat. 1255 ff, 12 U.S.C. 1724-1730, provides in pertinent part:

Sec. 402(a), 48 Stat. 1256, 12 U.S.C. 1725; cf. Reorganization Plan No. 3 of 1947, *infra*, pp. 26-28:

SEC. 402. (a) There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corpora-

tion"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of a board of trustees to be composed of five members and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this title. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.

* * * * *

Sec. 405, 48 Stat. 1259, as amended by the Acts of June 27, 1950, Sec. 9, 64 Stat. 259, and Sept. 21, 1950, Sec. 5, 64 Stat. 894, 12 U. S. C. 1728:

SEC. 405. (a) Each institution whose application for insurance under this title is approved by the Corporation shall be entitled to insurance up to the full withdrawal or repurchasable value of the accounts of each of its members and investors (including individuals, partnerships, associations, and corporations) holding withdrawable or repurchasable shares, investment certificates, or deposits, in such institution; except that no member or investor of any such institution shall be insured for an aggregate amount in excess of $10,000.

(b) In the event of a default by any insured institution, payment of each insured account in such insured institution which is surrendered and transferred to the Corporation

shall be made by the Corporation as soon as possible either (1) by cash or (2) by making available to each insured member a transferred account in a new insured institution in the same community or in another insured institution in an amount equal to the insured account of such insured member: *Provided,* That the Corporation, in its discretion, may require proof of claims to be filed before paying the insured accounts, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured account, it may require the final determination of a court of competent jurisdiction before paying such claim.

Reorganization Plan No. 3 of 1947, 61 Stat. 954, 5 U. S. C. (Supp. V 133y-16), provides in pertinent part:

SECTION 1. *Housing and Home Finance Agency.*—The Home Owners' Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, the United States Housing Authority, the Defense Homes Corporation, and the United States Housing Corporation, together with their respective functions, the functions of the Federal Home Loan Bank Board, and the other functions transferred by this Plan, are consolidated, subject to the provisions of sections 2 to 5, inclusive, hereof, into an agency which shall be known as the Housing and Home Finance Agency. There shall be in said Agency constituent agencies which shall be known as the Home Loan Bank Board, the

Federal Housing Administration, and the Public Housing Administration.

SECTION 2. *Home Loan Bank Board.*—(a) The Home Loan Bank Board shall consist of three members appointed by the President by and with the advice and consent of the Senate. Not more than two members of the Board shall be members of the same political party. The President shall designate the members of the Board first appointed hereunder to serve for terms expiring, respectively, at the close of business on June 30, 1949, June 30, 1950, and June 30, 1951, and thereafter the term of each member shall be four years. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the Board shall receive compensation at the rate of $10,000 per annum.

(b) The President shall designate one of the members of the Home Loan Bank Board as Chairman of the Board. The Chairman shall (1) be the chief executive officer of the Board, (2) appoint and direct the personnel necessary for the performance of the functions of the Board or of the Chairman or of any agency under the Board, and (3) designate the order in which the other members of the Board shall, during the absence or disability of the Chairman, be Acting Chairman and perform the duties of the Chairman.

(c) Except as otherwise provided in subsection (b) of this section there are transferred to the Home Loan Bank Board the

functions (1) of the Federal Home Loan Bank Board, (2) of the Board of Directors of the Home Owners' Loan Corporation, (3) of the Board of Trustees of the Federal Savings and Loan Insurance Corporation, (4) of any member or members of any of said Boards, and (5) with respect to the dissolution of the United States Housing Corporation.

The Federal Rules of Civil Procedure provide in pertinent part:

Rule 4 (f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

Rule 12 (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 23 (b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the

managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

24 C.F.R. (Pocket Supp. 1952) Subtitle B, Regulations Relating to Housing and Housing Credit, provides in pertinent part:

§ 144.1(4) *Members.* All holders of the association's savings accounts and all borrowers therefrom are members. In the consideration of all questions requiring action by the members of the association, each holder of a savings account shall be permitted to cast one vote for each $100, or fraction thereof, of the withdrawal value of his account. A borrowing member shall be permitted, as a borrower, to cast one vote, and to cast the number of votes to which he may be entitled as the holder of a savings account. No member, however, shall cast more than 50 votes. * * *

§ 148.1 *Receiver or conservator; appointment.* (a) Whenever, in the opinion of the Home Loan Bank Board, any Federal savings and loan association:

(1) Is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) Is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) Cannot with safety continue in business;

(4) Is impaired in that its assets do not have an aggregate value (in the judgment of the

Home Loan Bank Board) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) Is in imminent danger of becoming impaired;

(6) Is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) Has suspended payment of its obligations;

(8) Has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Home Loan Bank Board;

(9) Has refused by the refusal of any of its officers, directors, or employees to be examined upon oath by the Home Loan Bank Board or its representative concerning its affairs; or

(10) Has refused or failed to observe a lawful order of the Home Loan Bank Board,

the Home Loan Bank Board may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Home Loan Bank Board may appoint a conservator for such Federal association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of

the Federal Home Loan Bank System, or any Deputy or Assistant Governor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Home Loan Bank Board. The Secretary of the Home Loan Bank Board shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the address of the association as it shall appear on the records of the Home Loan Bank Board and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Home Loan Bank Board. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor.

§ 148.2 *Hearing on appointment.* Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or

requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Home Loan Bank Board shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Home Loan Bank Board discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Home Loan Bank Board shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Home Loan Bank Board Chairman or before a trial examiner or hearing officer, as the Home Loan Bank Board shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Home Loan Bank Board for a more definite statement of the cause or causes for the action.

The time of service upon the Home Loan Bank Board for the purposes of this section shall be the time of receipt by the Secretary of the Home Loan Bank Board.

§ 148.4 *Discharge of conservator or receiver.* An order of the Home Loan Bank Board discharging a conservator and returning the association to its management shall restore to such Federal association all its rights, powers, and privileges and shall restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. An order of the Home Loan Bank Board discharging a receiver and returning the association to its management shall by operation of law and without any conveyance or other instrument, act or deed, restore to such Federal association all its rights, powers and privileges, revest in such Federal association the title to all its property, and restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide.

§ 149.3 *Succession.* Immediately upon taking possession, pursuant to § 149.1, of such Federal association, the conservator shall succeed to all the rights, powers and privileges of the Federal association, its officers and directors, or any of them. Such officers and directors, or any of them, shall not thereafter have, exercise, or act in connection with, any such rights, powers or privileges, or any asset or property of any nature of the association:

Provided, however, That nothing in this section shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they may have to the Home Loan Bank Board or its representatives designated to receive such petitions concerning such association, or to represent the association at hearings provided for in the rules and regulations of this subchapter.

§ 149.9 *Final discharge and release of conservator*—(a) *Final report.* At such time as the conservator be relieved of his duties, the conservator shall file with the Home Loan Bank Board a detailed report in form satisfactory to the Home Loan Bank Board.

(b) *Final discharge.* Unless otherwise directed by the Home Loan Bank Board, upon the completion of the duties of the conservator or at such time as the conservator shall be otherwise relieved of his duties, an examination and audit may be directed by the Home Loan Bank Board in connection with the report of the conservator hereinbefore required. The accounts of the conservator shall be approved or disapproved, and, if approved, the conservator shall thereupon be given a complete and final discharge and release.

§ 150.3 *Succession.* Immediately upon the posting of the notice on the door of such Federal association as provided in § 150.2 (a), the receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers and privileges of the Federal association, its

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 658

JOHN D. WILLHOIT, PETITIONER

v.

JOHN H. FAHEY, ET AL., AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

This petition is closely related to the subject matter of the petitions in Nos. 591 and 592, and reference is respectfully made to the description of the litigation set forth in the briefs in opposition in those cases.

Petitioner filed his complaint in intervention in these proceedings, on behalf of himself and also on behalf of all customers of Long Beach similarly

situated (W.R. 3),[1] on September 15, 1952, *i.e.*, at a time when the *Long Beach* and *Los Angeles* actions were both pending in the Court of Appeals. The order permitting the intervention was signed by the District Judge on October 27, 1952 (W.R. 71, 77).

The gist of the 70-page long complaint is that Willhoit is a stockholder and customer of Long Beach, that some of his records kept by him with Long Beach disappeared while Long Beach was managed by the conservator and have not been returned to him as yet, and that he needs those records for the proper preparation of proceedings in the Tax Court of the United States.

Petitioner, who seeks review of the decisions of the Court of Appeals in the Ninth Circuit handed down in the *Long Beach* and *Los Angeles* cases, is faced with the fundamental jurisdictional objection that he is not a party of record to those proceedings. *Bayard* v. *Lombard,* 9 How. 529, 550-551; *Payne* v. *Niles,* 20 How. 219, 221; *Louisiana* v. *Jack,* 244 U.S. 397, 402; *Posner* v. *Anderson,* 293 U.S. 531. And the order permitting intervention made by the district court after the appeals were perfected, while possibly effective as far as the main litigation is concerned, could not add petitioner to the record of those appeals. *Ex Parte National Enameling Co.,* 201 U.S. 156, 162.

The petition itself seems to proceed on two theories. First, that petitioner's rights as a stockholder of Los Angeles have been affected by the

[1] W. R. refers to the record in No. 658.

Court of Appeals' decisions. His rights on that score are adequately represented by the *Mallonee* petition (No. 591). Second, that petitioner's records were lost while Long Beach was in the hands of the conservator. This claim of liability has, of course, no connection with the issues as to whether the appointment of the conservator and the readjustment of the Federal Home Loan Bank districts were valid, and it is difficult to understand how the decisions of the Court of Appeals have prejudiced petitioner's claim for the return of the allegedly withhold records. Finally, a subpoena issued under Rule 44(c) of the Rules of Practice of the Tax Court of the United States would have served the same purposes as the lengthy complaint.

For the above reasons, and those set forth in the briefs in opposition in Nos. 591 and 592, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

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